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Supreme Court, U.S.
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No. 85-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

DONALD F. BAKER,

Petitioner,

v.

HENRY WADE, DISTRICT ATTORNEY OF DALLAS COUNTY, TEXAS, IN HIS OFFICIAL CAPACITY; AND LEE HOLT, CITY ATTORNEY OF DALLAS, TEXAS, IN HIS OFFICIAL CAPACITY; AND THE CLASS OF ALL CITY, COUNTY AND DISTRICT ATTORNEYS IN THE STATE OF TEXAS, IN THEIR OFFICIAL CAPACITIES,

Respondents.

ON PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

PETITION FOR CERTIORARI

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QUESTIONS PRESENTED*

1. May a federal circuit court empower a local prosecutor to represent and bind the interests of an entire state, over the express objection of the state's Attorney General, when the Attorney General has decided that it would disserve the state's interests to appeal a federal district court decision striking down a state law?

2. Even assuming the circuit court's assertion of appellate jurisdiction was defensible, was that court correct in treating the summary affirmance in *Doe* v. *Commonwealth's Attorney* as resolving issues not necessarily reached by this Court in that case?

3. May a federal circuit court treat as judicially non-reviewable a legislative decision to criminalize certain private sexual intimacies on a gender-specific basis, simply because it may be said to reflect the moral preferences of a legislative majority?

*For the purposes of S.Ct. Rule 21.1(b), petitioner notes that, in the court below, Danny Hill, the District Attorney for the 47th Judicial District of Texas, sought to represent the State of Texas.

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ON PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

PETITION FOR CERTIORARI

OPINIONS BELOW

This petition seeks review of a divided decision of the United States Court of Appeals for the Fifth Circuit, sitting *en banc*.

which is reported at 769 F.2d 289 and reprinted as Appendix A.[1] The memorandum opinion of the United States District Court for the Northern District of Texas, Dallas Division (Buchmeyer, J.), is reported at 553 F.Supp. 1121 and reprinted as App.B. The final judgment of that court is reprinted as App.C. The supplemental opinion of the District Court is reported at 106 F.R.D. 526 and reprinted as App.D. The original decision of the unanimous Fifth Circuit panel is reported at 743 F.2d 236 and reprinted as App.E. The order of the Fifth Circuit denying rehearing *en banc* is reprinted as App.F.

JURISDICTION

The decision and judgment of the Court of Appeals, sitting *en banc*, were entered on August 26, 1985. A timely petition for rehearing *en banc* was denied, and the mandate was issued, on October 23, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

A. Constitutional Provisions

The First Amendment:

> "Congress shall make no law . . . abridging freedom of speech, or of the press. . .."

The Fourth Amendment:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . .."

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[1] References to the appendices will be styled, e.g., "App. A"; to particular pages therein, "23a"; to portions of the district court record, "R Vol.I at 23." The appendices are bound in a separate volume.

The Ninth Amendment:

> "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people."

The Fourteenth Amendment:

> "No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

B. Statutes

The text of 28 U.S.C. § 2403(b) is set out in App.G.

Texas Penal Code § 21.06 ("Homosexual Conduct") and the related definitions in §§ 1.05 and 21.01 provide in relevant part:

> A person commits an offense if he [or she] engages in deviate sexual intercourse with another individual of the same sex. "Deviate sexual intercourse" means any contact between any part of the genitals of one person and the mouth or anus of another person.

STATEMENT OF THE CASE

This case involves a statute that criminalizes specified sexual contacts, even in private between willing adult partners. In *Bowers* v. *Hardwick*, No. 85-140, this Court has already agreed to determine the proper standard of review applicable to a state law that criminalizes similar contacts. Although this case thus presents issues that closely parallel those in *Hardwick*, it also poses an additional procedural question of independent national significance. For the district court judgment invalidating a Texas sodomy statute at petitioner Baker's behest — a judgment awarded against the State of Texas as the true party in interest — would not be here at all had the Fifth Circuit not

asserted jurisdiction over the express objections of the State itself.

Petitioner Donald Baker filed suit under 42 U.S.C. § 1983[2] in the United States District Court for the Northern District of Texas on November 19, 1979, seeking a declaration that the Texas sodomy law, Texas Penal Code § 21.06,[3] is unconstitutional.[4] The complaint named Henry Wade, District Attorney of Dallas County, and Lee Holt, City Attorney of Dallas, as defendants in their official capacities. Defendant Holt promptly moved to have the case certified to the Attorney General of Texas pursuant to 28 U.S.C. § 2403(b), arguing that the state's chief legal officer must be allowed to intervene, because "neither the State of Texas, nor any agent, officer or employee of the State is a party to this suit." (R Vol.I at 58). On June 3, 1980, the district court agreed and granted the motion. (R Vol.I at 60). The Texas Attorney General intervened on July 9, 1980, and proceeded to defend § 21.06 on the merits (R Vol.I at 79), while Wade and Holt represented, pursuant to the district court's order of September 16, 1980, a defendant class consisting of "all district, county and city attorneys" who enforced § 21.06 on behalf of the State of Texas.[5]

The defendants asserted that the Texas statute "furthers the state's interests in protecting 'morality, decency, health, welfare, safety, and procreation.'" (22a). But at trial, the defendants "did not produce a single witness, or any other evidence, to support the[se] alleged state interests." (59a). Defendant

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[2] Jurisdiction was proper under 28 U.S.C. §§ 1331, 1343, 2201, 2202.

[3] The text of the statute is set out at p. 3 *supra*. A violation is punishable by "a fine not to exceed $200." Tex.Penal Code § 12.23. As the district court found, § 21.06 "does not concern rape, sexual abuse by force, offenses involving minors, or sexual conduct in public. Nor does it prohibit sodomy between a husband and wife or between an unmarried male and female. Instead, it condemns only homosexual conduct done in private between consenting adults." (22a).

[4] Petitioner did not seek injunctive relief.

[5] Defendant Holt advised approximately 40 district, county and city attorneys — including Danny Hill's predecessor in office as District Attorney of Potter County — that, if they wished to intervene in the suit, they should do so no later than September 1, 1980. None of them chose to do so. (23a n.1).

Holt "testified . . . that he had no knowledge of any way in which 'private consenting homosexual conduct frustrates procreation,'" or of how prohibiting it "protects the 'morals' of society." (40a). When asked "what kind of societal welfare is furthered by a law that intrudes into the bedroom of consenting sexual adults" (39a), defendant Wade testified, "I don't know of any." *Id.* The district court concluded that "there is no evidence (indeed, even no indication) that any of the interests advanced to support § 21.06 . . . were considered by the legislature when this statute was passed . . .." (41a).[6]

The district court ruled in petitioner Baker's favor on August 17, 1982,[7] holding that the defendants' "assertion of general platitudes (morality, decency, etc.) is totally inadequate to justify § 21.06" (60a) against claims that it violated the right of privacy and the equal protection of the laws when applied to private, noncommercial homosexual conduct between consenting adults (70a-72a). The court entered judgment for plaintiff and enjoined enforcement of § 21.06 on September 30, 1982. Upon judgment in his favor, plaintiff moved for interim costs and attorneys' fees in excess of $80,000 (R Vol.IV at

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[6] The court found "that the *sole* basis for § 21.06 was the fear of a backlash effect against the entire revised Penal Code should private homosexual acts be decriminalized." (103a; *see also* 42a & n.30, 79a).

[7] The court ruled that plaintiff Baker had standing to challenge § 21.06 because "the threat of prosecution [was] 'credible' and 'real,'" (69a). The defendants stipulated that violations of § 21.06 "'have been prosecuted by various assistant city attorneys and assistant district attorneys' in Dallas; and that both defendants 'would prosecute the plaintiff and other homosexuals under § 21.06 if a provable violation of the law came to their attention.'" (25a). A member of the Dallas school board testified that plaintiff Baker would have been fired from his teaching position "if there had even been a suspicion that he had violated § 21.06." (29a n.9, 69a-70a). The court found that even aside from the threat of prosecution, § 21.06 had a detrimental impact on "more than 700,000 individuals in Texas who are homosexuals, although they did not choose to be" (70a), because mere suspicion of the activity proscribed by § 21.06 was a basis for harassment, denial of citizenship and loss or refusal of employment. *Id.* This ruling on standing was affirmed by the Court of Appeals sitting *en banc*. (2a).

808), which were taxed against and paid by the State of Texas.[8]

Although the defendant class representatives decided not to appeal the judgment of the district court, Danny Hill, District Attorney of the 47th Judicial District (Potter County), who had played no part in the trial and who was neither a named defendant nor a class representative, filed a notice of appeal on October 28, 1982. (R Vol.IV at 873). The State of Texas filed a notice of appeal on November 1, 1982 (R Vol.IV at 874), but on March 9, 1983, after reviewing the record and determining that "the interests of the State would be best served by dismissing the appeal,"[9] the Attorney General withdrew the State's appeal. On March 28, 1983, Hill petitioned the Texas Supreme Court to issue a writ of mandamus compelling the Attorney General to pursue the appeal, but the state court refused even to hear Hill's petition.[10]

On April 12, 1983, more than six months after final judgment for petitioner Baker, Hill moved in the district court to intervene and be named class representative pursuant to Fed.R.Civ.P. 23 and 24. While these district court motions were pending, Hill filed identical motions in the Court of Appeals for the Fifth Circuit.[11] After conducting further hearings, the district court denied all of Hill's motions,[12] finding,

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[8] Defendant Wade argued that Dallas County should not be liable for fees because the suit "is, in essence, not only against the State of Texas, but is further particularized as a suit against the Legislature of the State . . .." (R Vol.III at 624). Defendant Muncy, who had succeeded defendant Holt, echoed this position. (R Vol.III at 638).

[9] Brief of the State of Texas on Rehearing *En Banc* at 4.

[10] *Hill et al.* v. *Mattox, Attorney General*, No. C-1973 (Tex.S.Ct. April 6, 1983).

[11] Hill informed the appellate court that identical motions were still pending in the district court. Without considering any evidence, a motions panel judge of the Fifth Circuit allowed Hill to intervene, even though no appeal was pending.

[12] The district court's supplemental opinion was filed on April 3, 1984. A slightly amended version of this opinion was published July 1, 1985, 106 F.R.D. 526, App. D, after Hill's motion for reconsideration was denied by the district court on June 12, 1985.

inter alia,[13] that Danny Hill "would not be an adequate representative" of the interests of the state.[14] That finding has never been overturned.[15]

On September 21, 1984, a panel of the Fifth Circuit Court of Appeals dismissed both Hill's petition to intervene directly at the appellate level and his underlying appeal (App.E).[16] The appellate court found that Texas law "plainly designates the Attorney General as the official responsible for protecting the State's interest in litigation" (128a), and concluded that, since the "Texas Attorney General has decided that the sovereign interests of the State are served by foregoing an appeal in this case . . . [i]t should be neither Hill's province nor ours to question that judgment." (132a).

Hill's petition for rehearing *en banc* was granted on January 28, 1985. Although the Attorney General intended to close the case when he withdrew his notice of appeal, he participated in briefing and argument below in order to oppose the court's assertion of jurisdiction.

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[13] The court also found that Hill had failed to show that the interests of the class and of the State of Texas were inadequately represented (110a-111a), and that Hill had failed even to show that he was not simply a front for a private group calling itself "Dallas Doctors Against AIDS" (87a & n.2, 90a & n.8, 111a, 112a).

[14] The district court based this ruling on specific findings relating to the conduct of Danny Hill and his counsel in litigating his post-trial motions: failure to comply with local and federal rules of procedure and evidence (97a-98a, 110a-111a); repeated failure to execute affidavits in support of his motions (90a n.8, 101a, 102a, 110a-111a); making wholly frivolous arguments and accusations (91a & n.9, 99a & n.18, 106a & n.28, 111a); and making misrepresentations to the court. (107a, 111a-112a).

[15] Hill's motion for reconsideration was denied on June 12, 1985. Hill filed a notice of appeal, but action on it was suspended by the Fifth Circuit pending the outcome of the rehearing *en banc*. The appeal has never been taken up by the Fifth Circuit, and has apparently been viewed as moot.

[16] The court unanimously determined: (1) that "the case was vigorously defended . . . both by the class representatives and by the Attorney General" (130a); (2) that Hill had alleged "no collusion, nonfeasance, or interest antagonistic to his own" on the part of the named defendants and the Attorney General, *id.*, nor had he alleged "that the representatives' interests diverged from his" (132a); and (3) that Hill's allegation of inadequate representation was based solely on the fact that the named defendants and the State had chosen not to pursue an appeal in this case. (130a-131a).

In a 9-7 *en banc* decision entered on August 26, 1985, the Fifth Circuit held, over the Attorney General's continuing objection, that Hill, being one of 1,085 county, city and district attorneys in Texas, had standing not only to intervene but also to "*represent the state*" *itself* on appeal (3a) (emphasis added), even though the Attorney General had determined that an appeal was not in the best interests of Texas.[17]

The Fifth Circuit majority proceeded to review the district court judgment on the merits, concluding in one short paragraph that this Court's summary affirmance in *Doe* v. *Commonwealth's Attorney*, 425 U.S. 901 (1976), was dispositive of the due process challenge. As to equal protection, the majority held it sufficient that § 21.06 was not "'totally unrelated to the pursuit of' implementing morality, a permissible state goal." (5a).

In denying plaintiff's petition for rehearing *en banc* on October 23, 1985, the same majority of the Fifth Circuit explained that "it is simply not the business of this court" to require the state to defend its implementation of the moral views of a legislative majority. (135a-136a). The court suggested that plaintiff should be grateful for this judicial deference, for if the court had ruled in his favor, "[t]he feelings of [those who disapprove of homosexuality] . . . could be elevated . . . and their frustrations might be vented upon [homosexuals] . . . ." (137a).

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[17] The majority opinion conceded that "the adequacy of representation [by the Attorney General] of [Hill's] interests, and [of the interests] of the class, is ordinarily an issue that would require hearing and determination by the district court." (4a). But the majority simply ignored the fact that, ten months before the Fifth Circuit decided to rehear the matter *en banc*, such a hearing had in fact been conducted by the district court, which had expressly made the determination — never reviewed by appeal — that "Hill would not be an adequate representative" for the interests of the State. *See* p. 7 & n.14 *supra*. The majority below dispensed with the rule that district court findings on such questions be upheld unless clearly erroneous, Fed.R.Civ.P. 52(a), by declaring itself "entitled to conclude *as a matter of law* that th[e] interests [of Texas law enforcement officials] were inadequately represented" by the Attorney General of Texas, solely on the ground that he had decided that an appeal was not in the best interests of the State. (4a) (emphasis added).

All of these rulings were rendered in order to overturn a district court judgment against a statute that the State of Texas, through its Attorney General, had affirmatively determined *not to appeal*. As the case comes to this Court, therefore, both petitioner Baker and the Attorney General of Texas oppose the assertion of appellate jurisdiction by the court below and urge this Court to vacate the action of the Fifth Circuit in treating the State of Texas as though it had appealed, through Danny Hill, the judgment rendered in favor of petitioner Baker by the district court.[18]

REASONS FOR GRANTING THE WRIT

The substantive issue decided below is, of course, "an important issue of constitutional law regarding the contours of the right of privacy afforded individuals for sexual matters . . . [an] issue over which courts are divided . . .." *City of North Muskegon* v. *Briggs*, 105 S.Ct. 3535, 3536 (1985) (White, J., joined by Burger, C.J., and Rehnquist, J., dissenting from denial of certiorari). The Fifth Circuit's *en banc* decision in this case resolves that issue in a manner that conflicts squarely with the holding of the Eleventh Circuit in *Hardwick* v. *Bowers*, 760 F.2d 1202 (11th Cir. 1985), *cert. granted sub nom. Bowers* v. *Hardwick*, 106 S.Ct. 342 (1985). Indeed, the Fifth Circuit has ruled, contrary to the Eleventh, not only that no *heightened* scrutiny is appropriate, either in terms of due process or in terms of equal protection, but also that *no* review of the rationality of *any* of the judgments underlying this criminal statute need be undertaken by a federal court in which the statute is properly challenged. Moreover, the Fifth Circuit deemed it irrelevant that the statute in this case,

[18] The state of Texas has accordingly filed a separate petition for certiorari in this Court. If perceived ambiguities as to whether the Attorney General of Texas was a party in the court below cloud the issue of the Attorney General's right to file such a petition for certiorari, petitioner Baker trusts that this Court will treat the Attorney General's petition as an *amicus* brief in support of review and reversal.

unlike that in *Hardwick*, criminalizes acts on a basis expressly dependent upon the *gender* of the actor. Thus, not even a decision by this Court reversing or vacating the Eleventh Circuit's ruling in *Hardwick* on the ground that strict scrutiny is inappropriate would necessarily endorse the extraordinary degree of deference, amounting to virtual abdication of judgment, that the Fifth Circuit accorded the Texas statute in this case. And if the Eleventh Circuit were to be upheld by this Court in *Hardwick*, the Fifth Circuit's ruling would, of course, be incorrect *a fortiori*.

Holding this case on the Court's docket pending final resolution of *Hardwick* is one obvious option. But plenary review, whatever the decision in *Hardwick*, is more appropriate. For, independent of its substantive holding, the Fifth Circuit in this case resolved two further questions in a manner that conflicts with controlling decisions of this Court and threatens to subvert the sound administration of justice by the federal judiciary.

First, the Fifth Circuit constituted itself a virtual roving commission to correct what it deemed federal error by permitting a local district attorney to appeal a district court's declaratory judgment — a judgment that the Attorney General of Texas, representing the State as the real party in interest pursuant to 28 U.S.C. § 2403(b), believed it in the best interest of the state, and of the class of nominal defendants, to accept.

Second, the Fifth Circuit misconstrued this Court's appellate authority by insisting that this Court's unexplained summary affirmances of district court rulings against plaintiffs must be read as holding more than that this Court simply viewed plaintiffs as entitled to no relief — whether for want of standing or otherwise.

For these reasons, neither denying certiorari, nor granting it solely in order to vacate the decision below and remand for further proceedings consistent with the ultimate decision in *Hardwick*, would suffice to restore sound federal practice in circuit courts. Accordingly, certiorari should be granted and this case set for plenary briefing and argument.

I. THE FIFTH CIRCUIT'S ATTEMPT TO TRANSFER CONTROL OVER THIS APPEAL FROM THE ATTORNEY GENERAL OF TEXAS TO A LOCAL PROSECUTOR.

A. Significance Of This Issue.

In an era in which 42 U.S.C. § 1983 has become a common vehicle for challenging the constitutionality of state laws, and in which awards of attorneys' fees to successful plaintiffs under 42 U.S.C. § 1988 have the potential to burden already strained state treasuries,[19] the ability of a state to speak with a single, authoritative voice in responding to such lawsuits is a necessity, not a luxury.

The Court of Appeals for the Fifth Circuit *en banc* turned a deaf ear to that voice in order that it might reverse what it deemed to be an erroneous judgment — about which no party had complained and from which no party had appealed. Thus the Court of Appeals conferred authority to prosecute an appeal on a disgruntled district attorney, who had been denied leave to intervene by the trial court and had been found to be an inadequate representative of the state and of the defendant class.[20]

B. Texas As The True Defendant.

From the defendants' perspective, the State of Texas is the real party in interest in this case.[21] Despite the fact that Danny Hill is but one of the 1,085 district, county and city attorneys in Texas, and that state law expressly and unambiguously provides that Hill "shall *only* represent the State of Texas in the

[19] Texas has already been taxed by the district court for more than $80,000 in costs and fees in this case (R Vol.IV at 809, 867).

[20] See p. 7 & n.14 *supra*.

[21] Both the majority and the dissent below accepted this premise (3a (majority); 17a (dissent)).

Counties of Potter and Armstrong,"[22] the Fifth Circuit's *en banc* majority effectively elevated Hill above the Attorney General of Texas not only by allowing Hill to countermand the Attorney General's decision not to appeal, but also by empowering the Potter County D.A. "to represent the state" itself. (3a).

But for the Eleventh Amendment, petitioner would have sued the state itself — since his complaint is that an enactment of the Texas legislature is unconstitutional. And under *Ex parte Young*, 209 U.S. 123 (1908), petitioner could have sued the Texas Attorney General for declaratory relief — but for the fact that the Attorney General's role in the enforcement of this law is only a passive one.[23] That fact made it necessary for petitioner to name the local law enforcement officials in whom the State had vested front-line prosecuting authority: the city, county and district attorneys. No member of this defendant class was sued as an individual; they were mere stand-ins for the State of Texas.

In this precise context, "Congress [has] recognized that suits brought against individual officers for injunctive relief are for all practical purposes suits against the State itself." *Hutto* v. *Finney*, 437 U.S. 678, 700 (1978).[24] And this Court has likewise observed that official-capacity suits "'represent only another way of pleading an action against an entity of which an officer is an agent.'" *Brandon* v. *Holt*, 105 S.Ct. 873, 878

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[22] Tex.Rev.Civ.Stat. Art. 326k-36, § 8 (emphasis added). *See also id.* at Art. 326k-36a, § 1 (both provisions recodified as Tex.Govt.Code § 43.127(a), (c) (1985)). By the terms of Article V, § 21, of the Texas Constitution, local criminal prosecutors are restricted to representing the State in the State's "District and inferior courts *in their respective counties*." (Emphasis added).

[23] Authority to prosecute criminal cases in the district and inferior courts is reposed in the county and district attorneys in their respective jurisdictions. Tex.Const. Art. V, § 21. That authority may not be given to anyone else, including the Attorney General. *Shepperd* v. *Alaniz*, 303 S.W.2d 846, 850 (Tex.Civ.App. 1957); *State ex rel. Downs* v. *Harney*, 164 S.W.2d 55, 57 (Tex.Civ.App. 1942).

[24] The district court fully understood this reality. In its final judgment, the court ordered that the plaintiff's costs and attorneys' fees were to be "taxed against the *defendant State of Texas*." (86a) (emphasis added).

n.21 (1985) (quoting *Monell* v. *New York City Dept. of Social Services*, 436 U.S. 658, 690 n.55 (1978)).[25] In every relevant sense, therefore, petitioner Baker was litigating against the State of Texas itself. *Hutto* v. *Finney*, 437 U.S. at 699.

C. Governmental Reasons Not To Appeal An Adverse Decision.

A state may have sound reasons for not appealing an adverse decision. "Unlike a private litigant who generally does not forego an appeal if he believes that he can prevail, the [government] considers a variety of factors, such as [its] limited resources . . . and the crowded dockets of the courts, before authorizing an appeal." *United States* v. *Mendoza*, 464 U.S. 154, 161 (1984). There is also the possibility that various factors may lead "successive Administrations . . . to take differing positions with respect to the resolution of a particular issue." *Id.* In the case at hand, Texas' notice of appeal to the Fifth Circuit was filed by Attorney General Jim Mattox's predecessor in office, just a few days before Mattox was elected in November of 1982. Attorney General Mattox withdrew that appeal several months later.[26]

Even when a change in the government's position is not involved, the decision whether to appeal an adverse judgment is fraught with consequence for the state. An appeal gives an appellate court an opportunity to affirm the judgment below

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[25] Hill has never alleged, nor could he allege, any interest in this case distinct from that of the State of Texas in seeing its criminal laws enforced. In his individual capacity, Hill has no "judicially cognizable interest in the prosecution or nonprosecution of another." *Linda R.S.* v. *Richard D.*, 410 U.S. 614, 619 (1973). Thus Hill, like the named defendants who requested that the case be certified to the Attorney General of Texas pursuant to 28 U.S.C. § 2403(b), "ha[s] no personal interest in the conduct of the State's litigation." *Hutto* v. *Finney*, 437 U.S. at 699 n.32.

[26] Those in the executive branch responsible for enforcing a given statute may also wish to use an adverse decision as an opportunity to engage the state legislature or the state's courts in a dialogue leading to a state, rather than a federal, resolution of the dispute — by proposing, for example, narrower statutory language or a suitable narrowing interpretation.

in more sweeping terms, or on grounds that the state may find even more objectionable. In such a situation, prosecution of the appeal may well be deemed more than a waste of time and effort. And the record of a particular case may seem so unfavorable to the state's highest law enforcement officials as to make discretion the better part of valor.[27]

Appeals of adverse judgments also entail financial risks to the state. The delay involved in pursuing an unsuccessful appeal allows time for the interest on a monetary judgment to compound, and interim inflation almost inevitably increases the cost of compliance with remedial court orders.[28] Appeals of constitutional challenges such as the case at hand also threaten the state treasury with the possibility of additional awards of attorneys fees under 42 U.S.C. § 1988. *Hutto* v. *Finney*, 437 U.S. at 693, 699. Texas has already been taxed by the district court for more than $80,000 in costs and fees (R Vol.IV at 809, 867), and it will obviously be liable for any future awards under § 1988. *See Brandon* v. *Holt*, 105 S.Ct. at 878; *Hutto* v. *Finney*, 437 U.S. at 699; *Crane* v. *Texas*, 759 F.2d 412, 429, 430, 432 (5th Cir. 1985), *reh'g denied*, 766 F.2d 193, 194 (5th Cir. 1985).

Moreover, allowing the state to be represented by anything less than its chief legal officer would fail to ensure the adequate adversarial confrontation "upon which the court so largely depends for illumination of difficult constitutional questions." *Baker* v. *Carr*, 369 U.S. 186, 204 (1962). The plain fact is that city or county attorneys typically lack both the ability, in terms of staff and other resources, and the power, it terms of

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[27] In the case at hand, the record reveals the defendants' inability even to explain, let alone to prove, how the challenged statute served *any* state purpose. (*See, e.g.* 38a-40a).

[28] By the time Attorney General Mattox was elected and managed to conclude 13 years of prison conditions litigation in *Ruiz* v. *Estelle*, 679 F.2d 1115 (5th Cir. 1982), *amended in part and vacated in part*, 688 F.2d 266 (1982), *cert. denied*, 460 U.S. 1042 (1983), the delays in resolving the case had increased the cost of implementing remedial measures — and therefore the cost of settling the case on behalf of the Texas Department of Corrections — by as much as $146 million. The *Ruiz* lawsuit also cost the state nearly $7 million in attorneys' fees. *Dallas Times Herald* at A-21 (May 17, 1985).

statutory authorization, to represent the state adequately in constitutional litigation.[29]

In particular, Danny Hill cannot internalize, in his official capacity as District Attorney for Potter County, the costs and benefits to the entire State of Texas that are necessarily at stake in this constitutional challenge to a state criminal statute. Hill may safely be accorded prosecutorial discretion within his bailiwick in the northern Texas panhandle; but, as the scale of the legal controversy increases, both geographically and otherwise, so must the resources and the legal and political authority of the officer in charge.[30]

The court below is thus manifestly mistaken in its conclusion that "allowing the appeal to proceed" over the objections of the Attorney General "prejudiced no one." (3a). The treasury and sovereign prerogatives of Texas have obviously been put at risk and have, in that sense, been prejudiced — even though the Fifth Circuit reversed the district court judgment.[31] And petitioner Baker's own interests have been profoundly prejudiced: had the Attorney General's decision on behalf of the

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[29] For example, only the Attorney General of Texas may "compromise or settle" suits brought against officers or employees of most state agencies "for deprivation of a right . . . secured by the Constitution or laws of . . . the United States." Tex.Rev.Civ.Stats. Art. 6252-26, §§ 1.(a) (2), 2 (recodified as Tex.Civ.Prac. & Rem.Code §§ 104.001-104.005 (1985)). And "[a]n admission made by a district or county attorney in a suit or action to which the state is a party does not prejudice the rights of the state." Tex.Govt.Code § 41.003 (1985). See also pp. 11-12 & n.22 *supra*.

[30] As long ago as *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819), this Court recognized that only a level of government high enough to represent all who are directly affected by a decision may be entrusted with the power to decide. *Id.* at 431. In Chief Justice Marshall's words, a "difference . . . always exists . . . between the action of the whole on a part, and the action of a part on the whole . . .." *Id.* at 435-36.

[31] The legitimacy of a circuit court's seizure of jurisdiction and its usurpation of a state's sovereign prerogatives cannot be judged by the fortuity of the outcome in this or any other particular instance. This case is not over yet, and the Fifth Circuit's actions may ultimately do little more than subject Texas to liability for another award under § 1988. In any event, Texas and the other states in the Fifth Circuit can hardly rest assured that the Court of Appeals — and, ultimately, this Court — will always rule in their favor whenever the Fifth Circuit compels them to pursue appeals from adverse judgments.

State of Texas been respected by the Fifth Circuit, the district court's judgment in Baker's favor would have been undisturbed.

In the federal Department of Justice, the authority to appeal adverse judgments is reposed not in the hundred-odd United States Attorneys, but in the office of the Solicitor General.[32] That office has long pursued a policy of accepting defeats in lower courts when an appeal would not, in its judgment, serve the interests of the government as a whole. *See United States* v. *Mendoza*, 464 U.S. at 160-61. Surely the sovereign State of Texas enjoys an equal right to focus discretionary power over appeals in its chief legal officer. *Compare Hercules Carrier, Inc.* v. *Florida*, 768 F.2d 1558, 1578-80 (11th Cir. 1985) (applying rationale of *Mendoza* to hold that state governments are equally entitled to flexibility in deciding when to press a case).

D. Congressional Recognition Of The Role Of State Attorneys General.

Although Texas law leaves it to the discretion of the Attorney General, and not to any one of the thousand-odd local prosecutors, to forego an appeal in a case such as this,[33] it is conceivable that Congress could override that allocation of authority. But the Fifth Circuit cannot.[34] For it is to the Congress, and not the Article III courts, that the protection of those sovereign interests is primarily entrusted — both under the Tenth Amendment, *see Garcia* v. *San Antonio Metropolitan Transit Author-*

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[32] 28 C.F.R. § 0.20(b) (1984); *see United States* v. *Mendoza*, 464 U.S. 154, 160 n.6 (1984).

[33] *See* pp. 18-20 *infra*.

[34] There is no doubt, of course, "that the Courts of Appeals have supervisory powers that permit . . . the promulgation of procedural rules governing the management of litigation." *Thomas* v. *Arn*, 54 U.S.L.W. 4032, 4034 (U.S. December 4, 1985). But such supervisory powers may not be exercised in ways that conflict with congressional enactments, *id*. Nor is there any statute or precedent that authorizes the Fifth Circuit to supplant a state's sovereign judgment as to whether an appeal is wise with the Circuit's own roving assessment of which unappealed decisions merit reversal.

ity, 105 S.Ct. 1005, 1020 (1985), and under the Eleventh Amendment, *see Atascadero State Hospital* v. *Scanlon*, 105 S.Ct. 3142, 3147-49 (1985). Absent a clear statement by Congress of its intent to displace a state's legal hierarchy on a matter demonstrably affecting the state's law enforcement strategy and potentially burdening the state's treasury, the federal judiciary should be deemed to lack any authority to take such a step on its own.

Far from having made any such statement, Congress has long recognized the primacy of state attorneys general in directing litigation challenging the constitutionality of state law. Section 2403(b) of Title 28 of the United States Code grants a state's attorney general an automatic right of intervention and full party status in any federal judicial proceeding in which the constitutionality of a law of that state is drawn into question. See App. G. This provision is no mere formalistic notice requirement. In drafting § 2403(b), Congress expressly noted its solicitude for the prerogatives of "the chief legal officers of the States." S.Rep. No. 204, 94th Cong., 2d Sess. 9, *reprinted in* 1976 U.S. Code Cong. & Ad. News 1988, 1997 (hereafter "S.Rep. No. 94-204").

This congressional policy is animated not by the niceties of federal-state protocol, but by a profoundly practical recognition of the realities of government hierarchies and the demands of litigation. In enacting the mandatory mechanism in § 2403(b), Congress sought to assure an adequate opportunity for state attorneys general to appear in, and to control appeals from, cases challenging the constitutionality of their states' laws. S.Rep. No. 94-204 at 10. In the instant case, intervention by the Texas Attorney General pursuant to § 2403(b) to protect the interest of the state as the real party in interest plainly entails a presumption that, if "the State's Attorney General . . . ha[s] decided that it is not in the state's interests to appeal, it is not the province of any of the 1,085 district, county, and city attorneys of the State to do so on the *a priori* basis that all others are out of step and that he alone knows the state's true interest." (18a) (dissenting opinion).

It is no surprise that § 2403(b) is designed to involve the states' attorneys general, and not merely their inferior agents and local legal representatives. For the provision was enacted in 1976 as a successor to the largely repealed three-judge court requirement. *See* P.L. 94-381, 90 Stat. 1119; S.Rep. No. 94-204. The purpose of that unwieldy jurisdictional device was, in Justice Frankfurter's words, the provision of "procedural protection against an improvident *state-wide* doom by a federal court of a *state's* legislative policy." *Phillips* v. *United States*, 312 U.S. 246, 251 (1941) (emphasis added). Under the Three-Judge Court Act, as under § 2403(b), the federal judiciary had been directed by Congress to deal with the states through their attorneys general. *See, e.g.*, 28 U.S.C. § 2284 (2), (5). The Act did not apply if the law challenged were a purely local ordinance or a state enactment having only local application, *Moody* v. *Flowers*, 387 U.S. 97, 101 (1967); *Ex parte Collins*, 277 U.S. 565, 568 (1928), nor did it extend to suits against local officers or even against "state officers performing matters of purely local concern," *Moody* v. *Flowers*, 387 U.S. at 102. But the Act did apply to — and the state's attorney general was to be involved in — suits brought against a local officer performing a state function that embodies a policy of statewide concern, such as a local district attorney enforcing a criminal statute of statewide application. *Spielman Motor Co.* v. *Dodge*, 295 U.S. 89, 94 (1935).[35] The legislative genealogy of § 2403(b) makes plain its purpose of ensuring that the federal courts solicit and respect the views of a state's designated legal spokesman whenever *state*, rather than merely local, concerns are threatened by federal litigation.

E. Texas' Designated Legal Spokesman.

Presumably, a state remains free, despite these considerations, to fragment its law enforcement structure by deciding

[35] Indeed, the *Spielman* Court held that it is this "function [of] . . . enforcing a statute of general application [that] is of controlling importance in giving effect to the intent of the Congress." *Id.* at 94-95.

that any of its hundreds of local prosecutors may represent and bind the entire state in certain procedural settings.[36] But there is no reason to attribute to the State of Texas so aberrant a scheme.[37]

On the contrary, the Constitution and laws of Texas designate the Attorney General as "chief law officer of the state," and charge him with "representing the state in civil litigation."[38] This power to represent the state is "exclusive," and "if the services of other lawyers are to be had it must be with [the Attorney General's] permission and 'in subordination' to his authority." *United States* v. *Texas*, 680 F.2d 356, 368 n.16 (5th Cir. 1982); *see also Hill* v. *Texas Water Quality Bd.*, 568 S.W.2d 738, 741 (Tex.Civ.App. 1978). The Texas Supreme Court has long held that, with respect to litigation, "the Attorney General must exercise judgment and discretion, which will not be controlled by other authorities." *Charles Scribner's*

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[36] *See New York* v. *Uplinger*, 104 S.Ct. 2332, 2333 n.1 (1984) ("The allocation of authority among State officers to represent the State before this Court is . . . wholly a matter of State concern"); *Personnel Administrator* v. *Feeney*, 429 U.S. 66 (1976) (certifying to state's highest court the question of who could represent various state agencies and officers in this Court).

[37] Were there any reason to suppose that Texas had taken such a step, the proper course would be for this Court to certify an appropriate question to the Texas Supreme Court. The following question might, in that event, be a suitable one:

> Does Texas law provide that a local prosecutor may pursue an appeal and bind the State and its treasury over the objection of the Attorney General, in a civil case in which the Attorney General has appeared on behalf of the State, and in which the State is the only true party in interest?

On November 5, 1985, the Texas electorate approved an amendment to Article V of the State Constitution, granting the Texas Supreme Court "jurisdiction to answer questions of state law certified from a federal appellate court." Tex.Const.Art. V § 3-c(a). The amendment took effect January 1, 1986, and thus was not available to the court below.

[38] Tex.Const. Art.IV, § 22 (Interpretive Commentary). *See also* Tex.Rev.Civ.Stat. Art. 4395 ("The Attorney General shall prosecute and defend all actions in the Supreme Court or the Courts of Civil Appeals in which the State may be interested").

Sons v. *Marrs*, 114 Tex. 11, 27, 262 S.W. 722, 727 (1924).[39] This discretion necessarily includes the power "to decide whether to appeal a case in which the State ha[s] experienced an adverse judgment in the trial court." *Bullock* v. *Texas Skating Ass'n*, 583 S.W.2d 888, 894 (Tex.Civ.App. 1979).

F. Conclusion.

In sum, both Congress and the State of Texas have designated the Texas Attorney General as the authoritative legal voice for the state when it is the real party in interest — as in cases that challenge the constitutionality of state laws.[40] Neither sovereign authority — and there are but two in our federal system, *see Community Communications Co.* v. *Boulder*, 455 U.S. 40, 53-54 (1982) — has authorized any of the 1,085 local law enforcement officials in Texas to expose the Texas treasury to liability for attorneys' fees on appeal over the objections of the state's Attorney General, or to determine what litigation strategy is in the best interests of the entire State of Texas. It is a principle of long standing that a state's sovereign

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[39] Danny Hill has himself previously conceded this issue. After the state withdrew its appeal, Hill and State Representative Bill Ceverha unsuccessfully petitioned the Supreme Court of Texas for a writ of mandamus compelling the Attorney General to prosecute the appeal. See n. 10 *supra*. In their sworn, verified petition, they contended that the issuance of such a writ to the Attorney General was their only adequate remedy, because "*no other state official or agency has the authority to represent the State of Texas*." Relators' Answer to Respondent's Reply to Motion for Leave to File Petition for Writ of Mandamus at 2 (emphasis added). Indeed, after the Texas Supreme Court refused even to *hear* Hill and Ceverha's petition, Rep. Ceverha introduced legislation to deprive the Attorney General of his discretion to abandon the defense of a challenged state law. The official Bill Analysis issued by the Texas legislature's Committee on State Affairs declared that "[u]nder current Texas law the Attorney General may enter into an out-of-court settlement of a suit pending before a federal court that would have the effect of . . . declaring a state statute to be unconstitutional under federal law." Bill Analysis of H.B. 867. The bill was defeated.

[40] This Court has itself stated that, "in addressing the constitutionality of a statute with state-wide application [, it] consider[s] highly relevant the views of the State's chief law enforcement official." *New York* v. *Uplinger*, 104 S.Ct. 2332, 2333 n.1 (1984); *see also* Sup.Ct.Rule 36.4.

immunity may not be breached in a federal court without permission, in "unequivocal terms," from Congress or from the state itself. *Green* v. *Mansour*, 54 U.S.L.W. 4011, 4012 (U.S. Dec. 3, 1985).

Unless the Fifth Circuit's contrary ruling in this respect is reversed, the circuit courts, and this Court, could confront a wave of appeals brought by district or city attorneys in any of the 50,000 "different units of local government in this country," *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389, 407 (1978) (footnote omitted). Those law enforcement officials are often the nominal defendants in § 1983 actions. Petitioner Baker thus stands injured by an assertion of appellate jurisdiction that is inconsistent with state sovereignty, with federal law, and with this Court's need to maintain the orderly administration of the federal courts.

II. THE FIFTH CIRCUIT'S ATTRIBUTION OF CONJECTURAL MEANINGS TO THIS COURT'S SUMMARY DISPOSITIONS.

Rivaling the Fifth Circuit's unjustifiably *broad* view of its own appellate jurisdiction is that court's unwarrantedly *narrow* view of the appellate jurisdiction of this Court — a view that led the Fifth Circuit to conclude that this Court *had* to have endorsed the due process/privacy views of the district court whose judgment it summarily affirmed in *Doe* v. *Commonwealth's Attorney*, 425 U.S. 901 (1976), rather than affirming that judgment on any other basis. The Fifth Circuit expressly adopted (see 4a-5a) the analysis of Judge Kravitch's dissenting opinion in *Hardwick*, 760 F.2d at 1213-16, to the effect that, if the plaintiff in that case had lacked standing to challenge the Virginia sodomy law, this Court would automatically have been deprived of jurisdiction even to hear the plaintiff's appeal, and would have had no choice but to "*dismiss the appeal.*" 760 F.2d at 1214 (emphasis in original). That is flatly wrong. As long ago as *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288 (1936), Justice Brandeis reasoned that, because the

plaintiffs in that case lacked standing, the Court should *affirm* the lower court's decision against plaintiffs "without passing upon it." *Id.* at 341 (concurring opinion). Clearly, the *ground* on which a lower court purports to act in ruling against a plaintiff is immaterial: an unexplained affirmance of such a ruling by this Court should be deemed to stand for no more than the proposition that the *result* below — a judgment against plaintiff — was correct on the record made in the lower court.[41]

Indeed, Justice Rehnquist's concurring opinion in *Pressler* v. *Blumenthal*, 434 U.S. 1028 (1978), demonstrates the plain error both of Judge Kravitch and of the Fifth Circuit's reliance upon her analysis. Justice Rehnquist joined this Court's summary affirmance of *Pressler* v. *Simon*, 428 F.Supp. 302 (D.D.C. 1976), on the express ground that "such affirmance does not necessarily reflect this Court's agreement with the conclusion reached by the District Court on the merits . . .. Our 'unexplicated affirmance' without opinion could rest as readily on our conclusion that appellant lacked standing to litigate the merits . . .." *Pressler* v. *Blumenthal*, 434 U.S. at 1028-29 (Rehnquist, J., concurring).[42]

Doe v. *Commonwealth's Attorney* is procedurally indistinguishable from *Pressler*. That the issue of standing was not raised by the parties in *Doe* is, of course, immaterial. For the authority of this Court to raise the issue of justiciability *sua sponte* is beyond question. Entirely apart from opinions of this Court subsequent to *Doe* expressly raising the question of just what that case should be taken to have decided, *see, e.g., Carey*

[41] As the Chief Justice explained in his concurring opinion in *Fusari* v. *Steinberg*, 419 U.S. 379, 391-92 (1975), a summary affirmance of a three-judge district court "affirms the judgment but not necessarily the reasoning by which it was reached." Thus, the precedential effect of a summary disposition must "be assessed in the light of all of the facts in that case . . .." *Mandel* v. *Bradley*, 432 U.S. 173, 177 (1977) (*per curiam*) (reversing a trial court that had relied on a previous summary affirmance). Surely the fact that the plaintiff in *Doe* alleged nothing approaching a concrete harm sheds some "light" on the significance of that summary disposition. See n. 44 *infra*.

[42] The District Court for the District of Columbia had held that Representative Pressler had standing to challenge the constitutional validity of two statutes controlling congressional salaries, but found the statutes to be constitutional. 428 F.Supp. at 306.

v. *Population Services International*, 431 U.S. 678, 688 n.5, 694 n.17 (1977), it therefore seems clear that the Fifth Circuit treated this Court's summary affirmance improperly and thereby exacerbated the extant confusion as to the value of summary dispositions in the lower federal courts.[43] Unless this Court wishes to assume the burden of explaining, in every case like *Doe*, whether it is affirming on the ground that it deems the challenged statute to be valid or on the ground that it deems the plaintiffs — who, in *Doe*, had alleged no concrete injury whatever[44] — to lack standing, the reasoning of the court below must be repudiated in no uncertain terms.[45]

III. THE FIFTH CIRCUIT'S ABDICATION OF ANY MEANINGFUL REVIEW.

Reaching the merits, the Fifth Circuit, having treated *Doe* v. *Commonwealth's Attorney* as decisive on the due process/privacy issue, disposed of the equal protection claim against § 21.06 in a single, short paragraph, declaring that "the standard of review is whether [the statute] is rationally related to a legitimate state end." (5a). For the reasons that follow, this

[43] In particular, there is a clear conflict among the circuits on the meaning of this Court's summary disposition of *Doe* v. *Commonwealth's Attorney*. The Eleventh Circuit (*Hardwick* v. *Bowers*) has ruled that that decision does not foreclose meaningful scrutiny of sodomy laws, while the Fifth (*Baker* v. *Wade*) and District of Columbia Circuits (*Dronenburg* v. *Zech*, 741 F.2d 1388 (1984)) have held that *Doe* conclusively defines the limits of the Constitution's protection of intimate personal behavior.

[44] The plaintiff alleged only that his awareness of the Virginia sodomy law had a "chilling effect" on his social life. See Jurisdictional Statement in *Doe* v. *Commonwealth's Attorney* No. 75-896 at 4. Contrast n. 7 *supra*.

[45] Having granted certiorari in *Hardwick*, wherein the Eleventh Circuit *reversed* a district court judgment against the plaintiff and remanded for a trial on the merits — this Court will presumably decide, on the merits, whether or not the heightened scrutiny for which the Eleventh Circuit called is proper, *regardless* of how lower courts should treat summary affirmances such as that in *Doe* v. *Commonwealth's Attorney*. Since *Hardwick* cannot be resolved in an opinion that merely unscrambles the state of the law on summary dispositions, *Baker* presents a far more suitable vehicle for clarifying this much mooted area of federal practice.

standard is wholly inadequate to test a law that would ban consenting, adult sexual intimacy in the confines of the home — whether challenged as an invasion of fundamental privacy or as a violation of equal protection. Moreover, even if mere rationality *were* the appropriate test of such a law, the Fifth Circuit proceeded in a manner that emptied that requirement of all content.

A. Inadequate Scrutiny In Light Of The Special Context Of Intimacies In The Home.

No decision of this Court reviewing a statute criminalizing an intimate aspect of personal liberty has ever endorsed such deference to the legislature as that required by the mere rationality standard to which the court below paid lip service.[46] However acceptable such a lax standard may be in reviewing laws regulating commerce and conduct in the public realm, it is fundamentally incompatible with limited government for the same standard to be applied to laws reaching into intimate relationships in the privacy of the home. For whatever the threshold of harm or offensiveness the state must establish to justify intruding upon conduct in *public*, it is settled that the required threshold is significantly higher when the same conduct occurs in a place, or under circumstances, that the individuals involved justifiably regard as private. *Stanley* v. *Georgia*, 394 U.S. 557 (1969).

Absent fears about sexual acts involving children, coercion, or commerce — none of which § 21.06 remotely addresses — intimate behavior in the solitude of a private home is subject to criminal prohibition only within judicially reviewable bounds of public justification. That is the irreducible minimum

[46] The Eleventh Circuit accordingly mandated stricter scrutiny of the State of Georgia's statute criminalizing all private oral or anal sexual contact — heterosexual *or* homosexual — in its decision in *Hardwick* v. *Bowers*, now awaiting argument in this Court. If the Court should postpone consideration of this petition pending a decision in *Hardwick*, and were then to affirm the judgment of the Eleventh Circuit, this petition should be granted at that time and the judgment of the Fifth Circuit vacated as based on an insufficiently rigorous standard of review.

for which *Stanley* v. *Georgia* surely stands. *See Griswold* v. *Connecticut*, 381 U.S. 479, 485-86 (1965); *Eisenstadt* v. *Baird*, 405 U.S. 438, 447-50 (1972). The deference that this Court has shown to regulation of *public* dissemination of obscene material — for example, in *Paris Adult Theatre I* v. *Slayton*, 413 U.S. 49 (1973) — has been replaced by more searching scrutiny when a state has sought to criminalize the *private* possession and viewing of the very same obscene material at home. *Stanley* v. *Georgia*, 394 U.S. at 564-65. As this Court recognized in the Chief Justice's opinion in *United States* v. *Orito*, 413 U.S. 139, 142 (1973), "[t]he Constitution extends special safeguards to the privacy of the home, just as it protects other special privacy rights such as those of marriage, procreation, motherhood, child rearing and education. . . . It is hardly necessary to catalog the myriad activities that may be lawfully conducted within the privacy and confines of the home, but may be prohibited in public."[47]

This recognition that the state's power to ban an act in private does not automatically follow from its power to condemn the same act as morally offensive in public is fundamentally at odds with the ruling of the court below. For that court held that, to defend a criminal prohibition such as the one challenged here, the State of Texas need do nothing more than report to the federal judiciary a popular aversion to the conduct proscribed. That is plainly not enough.

Even where the state invokes so powerful an interest as that of protecting potential human life, this Court has made clear "that, by adopting one theory of life, Texas may [not] override the rights [of individuals] that are at stake." *Roe* v. *Wade*, 410 U.S. 113, 162 (1973). Surely Texas, simply by adopting one theory of morality, may not override, at a single stroke, the rights of physical and associational privacy that are at stake in this case. No tenable view of the appropriate level of judicial scrutiny could support so utterly deferential a posture as that endorsed by the Fifth Circuit.

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[47] Texas itself recognized as much when it decriminalized private acts of fornication and adultery at the same time that it enacted § 21.06. (24a).

B. Inadequate Scrutiny Of The Gender Classifications In § 21.06.

Independent of the special privacy features of the conduct Texas would criminalize, the discrimination the law works on the basis of gender requires closer scrutiny than the minimal review the court below endorsed. Section 21.06 criminalizes certain physical contacts *only* if performed by members of the same gender. Should petitioner Baker, or any other man, be charged with oral or anal sexual contact with another man, in violation of the statute, an *element* of the offense would be the fact that the accused is male.[48] But if a woman were to commit those *identical acts* with the very same partner and be indicted under § 21.06, she would be entitled to acquittal on the ground that she is female. Similarly, for a person accused of violating § 21.06 with a woman, the law makes the fact that the accused is female decisive of criminality.[49]

That the statute is of "equal application" to men and women alike is no defense to the contention that it makes the criminality of particular conduct turn on the gender of the accused, any more than it was a defense of the miscegenation law struck down in *Loving* v. *Virginia*, 388 U.S. 1, 8-9 (1967), that that statute had "equal application" to blacks and whites. The miscegenation laws were unanimously held unconstitutional because they proscribed marriage *only* when "engaged in by

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[48] Before the latest revision in 1974, the Texas sodomy statute outlawed *all* oral and anal sex, regardless of the gender of those involved. (24a, 77a). Only four other states (Arkansas, Kansas, Montana and Nevada) make the gender of those accused of sodomy an element of the crime. Ark.Stat. § 41-1813 (1977); Kan.Stat. § 21-3505 (1974); Mont.Rev.Code § 94-5-505 (1975); Nev.Rev.Stat. § 201.190 (1977).

[49] It cannot be said that § 21.06 involves no gender classification of individuals but merely classifies on the basis of whether the *two people* involved are of the same or of different sexes. Although it does so classify, the Fourteenth Amendment addresses the rights of *individuals*, *Eisentadt* v. *Baird*, 405 U.S. 438, 453 (1972), not of pairs. From the point of view of any given individual, it is decisive that what the statute permits the individual to do and what it forbids are functions of the gender of that person.

members of different races." 388 U.S. at 11.[50] Likewise, § 21.06 must at least be subjected to meaningful scrutiny because it proscribes conduct otherwise legal in Texas (sodomy) *only* when engaged in by members of the same gender. To paraphrase *Loving*, it is difficult to conceive of a valid legislative purpose which makes a person's gender the test of whether conduct is a criminal offense. 388 U.S. at 11; *id.* at 13 (Stewart, J., concurring).

The fact that this statute, unlike the Georgia law at issue in *Hardwick*, proscribes conduct on the explicit basis of the accused's gender and, in that sense, resembles other gender-based classifications, is thus an independent basis for review of the decision below. For "the traditional minimum rationality test takes on a somewhat 'sharper focus' when gender-based classifications are challenged." *Michael M.* v. *Sonoma County Superior Court*, 450 U.S. 464, 468 (1981); *see Craig* v. *Boren*, 429 U.S. 190, 210 n.* (1976) (Powell, J., concurring).[51]

C. Abdication Of Even The Requirement Of Rationality.

Even if the court below were correct in holding a minimal relationship to a legitimate state purpose enough to defend the law, the judgment below must be reversed because the court failed to demand even that much of the Texas statute. For the Fifth Circuit treated the district court's "finding . . . to the effect that no rational basis exists for prohibiting this manner of sexual conduct" as simply immaterial to the constitutional issue (136a), and made it clear, upon denying the renewed petition for rehearing *en banc* on October 23, 1985, that it

[50] In *Loving*, the Court rejected the reasoning of *Pace* v. *Alabama*, 106 U.S. 583 (1883), which had upheld a conviction under a state law that punished interracial adultery and fornication more severely than such conduct by members of the same race. 388 U.S. at 10.

[51] The proposition that heightened scrutiny, or at least rationality review of a meaningful sort, should be triggered by this statute's gender classification must be distinguished from any argument that discrimination against homosexuals as a group is constitutionally suspect. *See, e.g.*, Note, *The Constitutional Status of Sexual Orientation: Homosexuality as a Suspect Classification*, 98 Harv.L.Rev. 1285 (1985).

had made no effort actually to assess the "rationality" of *any* of the many legislative judgments underlying the statute at issue. When pressed by petitioner to at least *address* the district court's conclusion that "the record in this particular case does not support a finding of moral justification for the statute or a finding that in its enactment the Texas legislature was motivated by considerations of morality" (135a), the court below insisted that "it is simply not the business of this court" to worry about such matters (135a-136a).[52]

For the Fifth Circuit, a passing reference to an historical "objection to homosexual conduct" sufficed to link the challenged statute to "implementing morality, a permissible state goal." (5a). If the mere invocation by a law's defenders of the truism that a legislative majority once deemed objectionable the very acts that the legislature declared criminal could suffice to terminate judicial review on the ground that "[m]oral issues should be resolved by the people" (137a), then, for all practical purposes, the rationality of laws regulating private consensual conduct will have been rendered a non-justiciable "political" question.[53]

Under such an utterly toothless standard, a court would be free to uphold a statute such as § 21.06 even if it found that the law in no way advanced any "legitimate public purpose that transcends the harm to the members of [a] disadvantaged class," *City of Cleburne* v. *Cleburne Living Center*, 105 S.Ct. 3249, 3261 (1985) (Stevens, J., joined by Burger, C.J., concurring) (footnote omitted), but rather reflected merely "a bare [legislative] desire to harm a politically unpopular group,"

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[52] Even if no determination of the actual purpose of § 21.06 were needed, the court of appeals shirked its duty, in the face of a district court finding of no rational purpose whatsoever, at least to *describe* "a legitimate purpose that we may reasonably presume to have motivated an impartial legislature." *Railroad Retirement Bd.* v. *Fritz*, 449 U.S. 166, 181 (1980) (Stevens, J., concurring in the judgment).

[53] In abjuring meaningful judicial scrutiny on the express grounds that the issue in this case is politically controversial and that affirming the district court judgment might provoke some citizens to take the law into their own hands to visit retribution on petitioner and other homosexuals, the Fifth Circuit seems to have confused "political cases" with "political questions." *See Baker* v. *Carr*, 369 U.S. 186, 217 (1962).

United States Dept. of Agriculture v. *Moreno*, 413 U.S. 528, 534 (1973). Indeed, the *en banc* majority was unimpressed by just such a finding by the district court below: namely, that when the Texas penal code was amended to legalize adultery, fornication, and heterosexual sodomy, the legislature deliberately singled out "'the private homosexual acts of consenting adults'" for continued criminal condemnation out of "'fear[of] a backlash against the entire Penal Code [revision] should such acts be decriminalized.'"[54] Nor did the court below find it significant that defendant Wade, a Texas prosecutor for thirty years, "testified that he knew of no rational basis for the discrimination in § 21.06 between homosexual sodomy and heterosexual sodomy" (62a-63a) and that, as the district court stressed, the defendants ultimately retreated to the position that the statute was justified by a "'phobic response'" to homosexuality, which has "'been abhorred in western civilization.'" (65a).

Not only did the court below abandon any standard of review trenchant enough to flush out unconstitutional legislative animus. Worse than that, it declared that popular antipathy itself tied the court's hands: were it to rule for petitioner Baker, the court below warned, the "feelings of [those who disapprove of homosexuality] . . . could be elevated . . . and their frustrations might be vented upon [homosexuals] to a degree that increased the burdens of the latter beyond the consequences endured under the invalidated statute." (137a). But the Constitution "does not permit any official act . . . to be predicated on so weak a reed. Public officials sworn to uphold the Constitution may not avoid a constitutional duty by bowing to the hypothetical effects of . . . prejudice that they assume to be both widely and deeply held. Surely the promise of the Fourteenth Amendment demands more than nihilistic surrender." *Palmer* v. *Thompson*, 403 U.S. 217, 260-61 (1971) (White, J., dissenting); *see also Palmore* v. *Sidoti*, 104 S.Ct. 1879, 1882 (1984).

[54] (79a) (quoting Von Beigel, *The Criminalization of Private Homosexual Acts: A Jurisprudential Case Study of a Decision by the Texas Bar Penal Code Revision Committee*, 6 *Human Rights* 23 (1977)). (*See also* 42a n.30, 103a).

CONCLUSION

For all of these reasons, a writ of certiorari should be granted now and this case should be set for argument. Alternatively, this petition should be held pending the outcome in *Bowers* v. *Hardwick*, No. 85-140, and, if the Eleventh Circuit is affirmed in that decision, should be granted and the decision below vacated and remanded in light of that affirmance.

Respectfully submitted,

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January 18, 1986

Supreme Court, U.S.
FILED
JAN 18 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

DONALD F. BAKER,

Petitioner,

v.

HENRY WADE, DISTRICT ATTORNEY OF DALLAS COUNTY, TEXAS, IN HIS OFFICIAL CAPACITY; AND LEE HOLT, CITY ATTORNEY OF DALLAS, TEXAS, IN HIS OFFICIAL CAPACITY; AND THE CLASS OF ALL CITY, COUNTY AND DISTRICT ATTORNEYS IN THE STATE OF TEXAS, IN THEIR OFFICIAL CAPACITIES,

Respondents.

ON PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

APPENDIX TO PETITION FOR CERTIORARI

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Appendix A.

Donald F. BAKER, Plaintiff-Appellee,

v.

Henry WADE, District Attorney of Dallas County, Texas, Etc., et al., Defendants,

Danny E. Hill, 47th District Attorney, Defendant-Appellant.

No. 82-1590.

United States Court of Appeals, Fifth Circuit.

Aug. 26, 1985.

Appeal from the United States District Court for the Northern District of Texas.

Before CLARK, Chief Judge, GOLDBERG, GEE, RUBIN, REAVLEY, POLITZ, RANDALL, TATE, JOHNSON, WILLIAMS, GARWOOD, JOLLY, HIGGINBOTHAM, DAVIS, HILL and JONES, Circuit Judges.*

REAVLEY, Circuit Judge:

Donald F. Baker, a homosexual, sought a declaration that Tex.Pen.Code Ann. § 21.06 (Vernon 1974) is unconstitutional. Section 21.06 proscribes "engag[ing] in deviate sexual

*Judge Goldberg, now a senior judge of this circuit, is participating as a member of the panel initially deciding the appeal. 28 U.S.C. § 46(c) (1982).

intercourse with another individual of the same sex." *Id.*[1] The district court held that section 21.06 violates the constitutional protections of privacy and equal protection. *Baker v. Wade*, 553 F.Supp. 1121 (N.D.Tex.1982). Danny E. Hill, the district attorney of Potter County and a member of the defendant class, sought to appeal the district court's judgment. A panel of this court held that Hill did not have the right to intervene and prosecute the appeal. *Baker v. Wade*, 743 F.2d 236 (5th Cir. 1984). We granted rehearing en banc and now hold that Hill is a proper appellant and that section 21.06 is constitutional.

1. Jurisdiction

Both Baker and Hill argue that the other is not properly before this court. Hill argues that Baker lacks standing to challenge the statute. Baker maintains that Hill could not appeal the district court judgment. We reject both arguments.

Baker has engaged in, and states that he will continue to engage in, homosexual activities proscribed by section 21.06. The defendant class representatives agreed that violations of section 21.06 have been prosecuted and that they will prosecute future violations where probable cause exists. When a criminal statute is challenged, a plaintiff may demonstrate standing without first exposing himself to arrest. It is enough that there exists a credible threat of prosecution. *Babbitt v. United Farm Workers National Union*, 442 U.S. 289, 99 S.Ct. 2301, 60 L.Ed.2d 895 (1979).

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[1] Deviate sexual intercourse is defined as "any contact between any part of the genitals of one person and the mouth or anus of another person." Tex.Pen. Code Ann. § 21.01(1) (Vernon 1974).

Insofar as § 21.05 condemns public homosexual conduct, it overlaps Tex. Pen.Code Ann. § 21.07 (Vernon 1974), which proscribes, among other sexual acts, deviate sexual intercourse in public places.

Coming to our jurisdiction to hear Hill's appeal, as of the date of the entry of the district court's judgment Hill was a member of the class, was enjoined by that judgment, and as district attorney was a proper official under Texas law to represent the state. *See* Texas Const. art. 5 § 21; *State v. Gary*, 163 Tex. 565, 359 S.W.2d 456, 458 (1962); *Shepperd v. Alaniz*, 303 S.W.2d 846 (Tex.Civ.App. — San Antonio 1957, no writ). As the deadline for giving notice of appeal approached, Hill filed his own notice. Several days later the attorney general of Texas filed a timely notice. It then appeared that the issue of the constitutionality of the Texas statute would be placed before the appellate court. However, several months later the attorney general filed a motion in this court to withdraw his appeal. When Hill learned of this fact, he sought a mandamus in the Supreme Court of Texas to order the attorney general to pursue the appeal, to which the latter responded that Hill had an adequate remedy at law by means of the direct appeal of the federal case, and pointed out to the Texas court: "Petitioner Hill has already filed a timely notice of appeal in the Fifth Circuit of the very decision they seek to have appealed."

Hill promptly filed a motion to intervene and to substitute himself as the class representative, first with the district court and subsequently with this court. A judge of this court granted Hill's motion. Under the peculiar facts of this case the order granting intervention was justified because Hill's position satisfied the requirements of both Fed.R.Civ.P. 23(d)(2) and 24(a)(2). His motion came as soon as he knew that his interests, affected by the judgment, i.e., the declaration of the unconstitutionality of the statute and the injunction against its enforcement, would be pursued. He would be seriously prejudiced were he not allowed to intervene, whereas allowing the appeal to proceed prejudiced no one. As a state official empowered by Texas law to enforce criminal laws, his interest and its im-

pairment by the district court's judgment cannot be questioned. The adequacy of representation of intervenor's interests, and especially those of the class, is ordinarily an issue that would require hearing and determination by the district court. In this case where the district court has rejected binding Supreme Court authority, the circuit court is entitled to conclude as a matter of law that those interests were inadequately represented by those who failed to pursue the appeal and that the state officer seeking to intervene was a proper party to do so. *See United Airlines, Inc. v. McDonald*, 432 U.S. 385, 97 S.Ct. 2464, 53 L.Ed.2d 423 (1977); *Stallworth v. Monsanto Co.*, 558 F.2d 257 (5th Cir. 1977); *F.W. Woolworth Co. v. Miscellaneous Warehousemen's Union, Local 781*, 629 F.2d 1204 (7th Cir. 1980), *cert. denied*, 451 U.S. 937, 101 S.Ct. 2016, 68 L.Ed.2d 324 (1981).

2. Constitutionality of Section 21.06

The district court held that section 21.06 violated Baker's constitutional right to privacy and to equal protection of the law. *Baker v. Wade*, 553 F.Supp. 1121, 1141, 1143 (N.D. Tex. 1982). Hill assails the district court's holding on the grounds that it fails to give effect to binding precedent and improperly expands constitutional principles. We agree.

A. Right to privacy

In *Doe v. Commonwealth's Attorney*, 425 U.S. 901, 96 S.Ct. 1489, 47 L.Ed.2d 751 (1976), the Supreme Court summarily affirmed the judgment of a three-judge district court upholding the constitutionality of a Virginia sodomy statute similar to the Texas statute which is attacked in the present suit. We consider the decision of the Court in *Doe* to be binding upon us for the reasons stated by the District of Columbia Circuit in *Dronenburg v. Zech*, 741 F.2d 1388, 1391-92 (D.C. Cir. 1984), and by Judge Kravitch in her dissent to the Eleventh

Circuit opinion in *Hardwick v. Bowers*, 760 F.2d 1202, 1213-16 (11th Cir. 1985). There can be no question but that the decision of the Supreme Court in *Doe* was on the merits of the case, not on the standing of the plaintiffs to bring the suit. We should follow that controlling authority until the Supreme Court itself has issued an unequivocal statement that *Doe* no longer controls. We refuse to speculate, on the basis of the writings cited to us by the appellee, about what the Court might do today on this issue.

B. Equal Protection

Because we have held that engaging in homosexual conduct is not a constitutionally protected liberty interest and because Baker has not cited any cases holding, and we refuse to hold, that homosexuals constitute a suspect or quasi-suspect classification, the standard of review is whether section 21.06 is rationally related to a legitimate state end. *McDonald v. Board of Election Commissioners*, 394 U.S. 802, 807-09, 89 S.Ct. 1404, 1408, 22 L.Ed.2d 739 (1969). In view of the strong objection to homosexual conduct, which has prevailed in Western culture for the past seven centuries, we cannot say that section 21.06 is "totally unrelated to the pursuit of," *id.* at 809, 89 S.Ct. at 1408, 22 L.Ed.2d at 745, implementing morality, a permissible state goal, *Berman v. Parker*, 348 U.S. 26, 32, 75 S.Ct. 98, 102, 99 L.Ed. 27 (1954); *Dronenburg v. Zech*, 741 F.2d 1388, 1398 (D.C. Cir. 1984). Therefore, section 21.06 does not deprive Baker of equal protection of the laws.[2]

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[2] We note, additionally, that although the district court in *Doe* did not address equal protection, the jurisdictional statement presented the equal protection argument to the Court. Jurisdictional Statement for Appellant at 9-10, *Doe v. Commonwealth's Attorney*, 425 U.S. 901, 96 S.Ct. 1489, 47 L.Ed.2d 751 (1976).

Because we hold that section 21.06 is constitutional, the injunction of the district court is vacated and the judgment is REVERSED.

GOLDBERG, Circuit Judge, dissenting:

I concur wholeheartedly with Judge Rubin's cogent dissent.

Given that the majority sees fit to reach the merits, however, I would hold Texas's homosexual sodomy statute unconstitutional. As both the Eleventh Circuit and the district court below concluded, the Supreme Court's summary affirmance in *Doe v. Commonwealth's Attorney*, 425 U.S. 901, 96 S.Ct. 1489, 47 L.Ed.2d 751 (1976), *aff'g* 403 F.Supp. 1199 (E.D.Va. 1975) (three-judge court), does not control our consideration of a state provision addressing "private consensual sexual behavior among adults," *Carey v. Population Services International*, 431 U.S. 678, 688 n.5, 694 n.17, 97 S.Ct. 2010, 2018 n.5, 2021 n.17, 52 L.Ed.2d 675 (1977). *See Hardwick v. Bowers*, 760 F.2d 1202 (11th Cir. 1985); *Baker v. Wade*, 553 F.Supp. 1121 (N.D. Tex. 1982). If ever there was a constitutional right to privacy, Texas has violated it by blatantly intruding into the private sex lives of fully consenting adults. Because this legislative trespass lacks a compelling state interest, I would hold this statute invalid on its face.

ALVIN B. RUBIN, Circuit Judge, with whom GOLDBERG, POLITZ, RANDALL, TATE, JOHNSON, and WILLIAMS, Circuit Judges join, dissenting.

Determined to uphold the constitutionality of a Texas statute whatever obstacles bar the way, the majority opinion tramples every procedural rule it considers. No party to the suit has pursued this appeal, but the majority opinion recognizes an appeal filed by a class member who was not a class representative at the time he filed his appeal, permits a so-called intervention to be filed in the court of appeals by the same class

member who sought to intervene only in his own abortive appeal, and decides that the Texas Attorney General together with representatives of a class including all of its prosecutorial officials do not provide adequate representation for the State of Texas in a suit involving the constitutionality of a criminal statute, but that any of the 1085 Texas district, county, and city attorneys is an appropriate party to represent the state and assert its position in the court of appeals. The court's judicial sponsorship of Danny Hill as spokesman for the State of Texas is not only unprecedented but ill-advised. The Texas Attorney General and the class representatives, who have been found wanting in no way save in failing to press the appeal, have decided that the sovereign interests of the state are served by allowing the district court decision to stand. It is neither Hill's province nor ours to question that judgment.

If this en banc decision is precedent, it assuredly rewrites the adjective law. If it is not intended to be precedential, but only a special life-support contrivance, undertaken for the one purpose of salvaging the statute, it denies equal justice both to the litigants before us and to those who, in the future, will be denied equally extreme judicial measures. I, therefore, respectfully dissent from the decision not to dismiss the appeal.

I.

Let us first trace the procedural history of this case in somewhat greater detail. The complaint named as defendants Lee Holt, the City Attorney for Dallas, Texas, and Henry Wade, the District Attorney for Dallas County, in their official capacities, and sought a declaratory judgment that the Texas statute is unconstitutional. Later, Baker filed a motion to certify a defendant class of officials responsible for enforcement of the statute.

Before the motion was heard, the Attorney General of Texas was notified of the suit, pursuant to 28 U.S.C. § 2403(b).[1] At the instance of Holt, the district court granted the State of Texas and the Attorney General "leave to intervene for the presentation of evidence and for argument on the question of the constitutionality of § 21.06," and the State of Texas filed what it titled a "Response of the State of Texas" to the complaint. Holt's assistant city attorney then wrote Thomas A. Curtis, the District Attorney of Potter County, Hill's predecessor in office, and thirty-nine other Texas officials, notifying each of the suit and the possibility of certification of a defendant class, and offering each an opportunity to intervene. Curtis did not seek to intervene nor did any other Texas district, county, or city attorney. Only then, and with the consent of the defendants, was the case certified as a defendant class action under Rule 23(b)(2) of the Federal Rules of Civil Procedure. The class was composed of "*all* district, county and city attorneys in the state of Texas responsible for the enforcement of Texas Penal Code Ann. § 21-06," and represented by Holt and Wade. The order named as lead class counsel Holt's assistant city attorney Joe Werner and as associate class counsel Wade's assistant district attorney C.J. Baldree and state assistant attorney general Lonny Zwiener. The class was properly

[1] 28 U.S.C. § 2403(b) reads as follows:

> In any action, suit, or proceeding in a court of the United States to which a State or any agency, officer, or employee thereof is not a party, wherein the constitutionality of any statute of that State affecting the public interest is drawn in question, the court shall certify such fact to the attorney general of the State, and shall permit the State to intervene for presentation of evidence, if evidence is otherwise admissible in the case, and for argument on the question of constitutionality. The State shall, subject to the applicable provisions of law, have all the rights of a party and be subject to all liabilities of a party as to court costs to the extent necessary for a proper presentation of the facts and law relating to the question of constitutionality.

certified as a (b)(2) class because the suit involved only a question generally applicable to the class.

The district court rendered a judgment declaring the statute unconstitutional and enjoining its enforcement on September 30, 1982. Danny Hill was then neither a named defendant nor a class representative, and he had never sought to intervene. Nonetheless, on October 28, Hill filed a notice of appeal. At that time, no named party had sought to appeal. Four days later the Attorney General of the State of Texas filed a notice of appeal on behalf of the State of Texas. Then, before any further proceedings in this court, the Attorney General withdrew his notice of appeal. Hill then unsuccessfully attempted to have the Texas Supreme Court mandamus the Attorney General, on March 28, 1983, to force him to pursue his Fifth Circuit appeal.

Hill next filed two motions in the district court on April 12, 1983. One was a motion to intervene and to "substitute" himself as class representative,[2] and the other was a motion to set aside the final judgment and reopen the evidence. These motions were not acted on by the district court until April 3, 1984, a year later. The correctness of that court's decision is not now before us.

While the district court motions were still pending, however, Hill filed a motion in this court to intervene and "substitute" himself as class representative.[3] In that motion, Hill explicitly acknowledged that "[o]n April 12, 1983, appellant filed a Motion to Intervene and Substitute Class Representative in the trial court. The trial court has not ruled on the Motions [*sic*]." On August 16, 1983, a judge of this court granted "appellant's

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[2] Procedurally, Hill's motion was not a request for substitution under Fed.R.Civ.P. 25, but was a motion to intervene and be named class representative under Fed.R.Civ.P. 23 and 24. *See* 7A C. Wright & A. Miller, Federal Practice and Procedure § 1951, at 638 (1972).

[3] *See supra* note 2.

motion to intervene and substitute class representative." To the extent that evidence, if it may be thus called, was offered in support of the motion, it consisted only of assertions in Hill's brief in support of the motion filed with this court.

Two weeks before oral argument of the case, the trial court denied Hill's motion to intervene and substitute class representative and his motion to set aside the final judgment and reopen the evidence. It found that Hill had not shown that the current class representatives were inadequate or that he could adequately represent the class. It granted Hill leave to refile his motion, however, if he were prepared to make such a showing. From the trial court's denial of a motion to reconsider, that decision has since been appealed but the appeal has not yet been heard.

II.

When Hill filed his notice of appeal, he was not a party to the case. He had no right to appeal. The majority does not hold that his appeal was properly lodged, for to do so would recognize that any class member may on his own motion appeal any judgment adversely affecting the class. Instead, it finds that this court has jurisdiction of the appeal because "[u]nder the peculiar facts of this case the order *granting intervention* was justified."[4] Thus, our jurisdiction is created by Hill's motion to intervene in an appeal filed only by Hill himself, the motion coming nine months after the notice of appeal.

This conclusion conveniently overlooks the question whether an intervention does not by its very nature require a subsisting action in which to intervene. An intervenor by definition does not create a suit or an appeal; he intervenes in an

[4] Opinion, 769 F.2d at 291 (emphasis added).

action that has already been undertaken. The majority does recognize that a problem is created by its recognition of a motion to intervene never filed in or acted on by a district court, saying, "The adequacy of representation of intervenor's interests, and especially those of the class, is *ordinarily* an issue that would require hearing and determination by the district court."[5] The majority goes on, however, to assert that, in this case, the question is one of law, a sheer *ipse dixit*, for the three cases cited for this proposition, with the ambiguous reference, "See," provide no support for it whatsoever. Whether the interests of a would-be intervenor have been inadequately represented and whether the interests of a class of which he is a member have also been inadequately represented are factual questions, to be resolved by a trial court, not questions of law.

In *United Airlines, Inc. v. McDonald*,[6] the first of the cases cited in support of this court's admittedly extraordinary recognition of Hill as an intervenor, the Supreme Court considered the timeliness of a motion to intervene filed in the district court for the purpose of appealing that court's earlier denial of class action certification, and no more. The district court had denied the motion[7] to intervene and had earlier denied a motion for class certification. The Supreme Court held that, on the record made in the district court, the motion to intervene for the purpose of appealing the district court's earlier denial of class action certification was timely. The Supreme Court cited a number of lower federal court decisions consistent with its opinion.[8] In

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[5] *Id.* (emphasis supplied).

[6] 432 U.S. 385, 97 S.Ct. 2464, 53 L.Ed.2d 423 (1977).

[7] *Id.* at 390, 97 S.Ct. at 2467, 53 L.Ed.2d at 429.

[8] *See id.* at 395 n.16, 97 S.Ct. at 2470 n.16, 53 L.Ed.2d at 433 n.16; *see also infra* note 9.

every one of these, a motion to intervene was filed in and ruled on by the district court.[9]

Our decision in *Stallworth v. Monsanto Co.*,[10] the next authority cited, gives no greater support. In its first sentence, the opinion states the issue considered and decided: "These consolidated appeals are taken from the district court's denial of two petitions for leave to intervene under Rule 24. . . ."[11] The Seventh Circuit, in *F.W. Woolworth Co. v. Miscellaneous Warehousemen's Union, Local No. 781*,[12] likewise considered only an appeal from the district court's denial of motions to intervene.[13] Indeed, in an opinion that has scarcely had time to reach the advance sheets, a panel of this court held, in *Fuel Oil Supply and Terminaling v. Gulf Oil Corp.*,[14] that whether a party has a right to intervene in a bankruptcy proceeding is a question of fact to be determined by the trial court.[15]

Rules 23(d)(2) and 24(a)(2) of the Federal Rules of Civil Procedure, which are relied upon by the majority, cannot sustain Hill's effort to intervene and create his own appeal in the

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[9] *See American Brake Shoe & Foundry Co. v. Interborough Rapid Transit Co.*, 3 F.R.D. 162 (S.D.N.Y. 1942); *Pellegrino v. Nesbit*, 203 F.2d 463 (9th Cir. 1953); *Hodgson v. United Mine Workers*, 473 F.2d 118, 129 (D.C. Cir. 1972); *Smuck v. Hobson*, 408 F.2d 175, 181-82 (D.C. Cir. 1969); *Zuber v. Allen*, 387 F.2d 862 (D.C. Cir. 1967); *Hobson v. Hansen*, 44 F.R.D. 18, 29-30, n.10 (D.D.C. 1968); *Wolpe* v. *Poretsky*, 144 F.2d 505, 508 (D.C. Cir.), *cert. denied*, 323 U.S. 777, 65 S.Ct. 190, 89 L.Ed. 621 (1944); *United States Casualty Co. v. Taylor*, 64 F.2d 521, 526-527 (4th Cir.), *cert. denied*, 290 U.S. 639, 54 S.Ct. 56, 78 L.Ed. 555 (1933); *see also Trbovich v. United Mine Workers*, 404 U.S. 528, 92 S.Ct. 630, 30 L.Ed.2d 686 (1972).

[10] 558 F.2d 257 (5th Cir. 1977).

[11] *Id.* at 260.

[12] 629 F.2d 1204 (7th Cir. 1980), *cert. denied*, 451 U.S. 937, 101 S.Ct. 2016, 68 L.Ed.2d 324 (1981).

[13] *See id.* at 1208.

[14] 762 F.2d 1283 (5th Cir. 1985).

[15] *Id.* at 1287-88.

court of appeals for they both deal, as Rule 1 plainly says, with "the procedure in the United States district courts." The "court" that may make appropriate orders, referred to in Rule 23(d)(2), which applies to class actions, is the district court in which the action is filed. The intervention permitted by Rule 24 is intervention in a pending action.

In *Johnson v. Georgia Highway Express, Inc.*,[16] we made it absolutely clear that the determination whether a class member would adequately and fairly represent the class and, thus, whether he should be named class representative is a determination for the trial court:

> Whether [the class member] will adequately represent the class is a question of fact to be 'raised and resolved in the trial court in the usual manner,. . . . Therefore, the court below, if it doubted appellant's ability to protect the interests of the class, could have had, and on remand still can have an evidentiary hearing on the issue.[17]

A federal court of appeals takes no evidence, creates no record, and decides no factual issues in the first instance. It is a court of review.

A motion filed in a district court by a nonparty who seeks to intervene in order to prosecute an appeal is significantly different from a motion filed in an appellate court by a nonparty who seeks to intervene in an existing appeal, and whether each kind of motion should be granted involves different judicial considerations. When the motion to intervene is filed in a district court, to enable the would-be intervenor to prosecute an appeal, evidence may be taken on such matters as whether the application is timely, whether the applicant's interest is

[16] 417 F.2d 1122 (5th Cir. 1969).

[17] *Id.* at 1124-25 (citation omitted).

adequately represented by existing parties, the nature and sufficiency of the would-be intervenor's interest, and any other questions pertinent to intervention, as required by Rule 24, or if the action is a class action, Rule 23. An appellate court may then review the district court's action on the basis of the record made in that court. When a motion is filed in an appellate court to intervene in an existing appeal, however, "a court of appeals may, but only in an exceptional case for imperative reasons, permit intervention where none was sought in the district court."[18] Thus we have refused to allow a nonparty to intervene on appeal when he was aware of the action in the district court and of his interest in it but failed to intervene in that court,[19] whereas we have allowed a nonparty who had no notice of the action below to intervene when there was no opposition to his intervention on appeal.[20] Even in these cases, however, an appeal had already been taken by a party to the action, into which the nonparty sought to intervene, and no motions to intervene were pending in the lower courts.

A class member is not precluded from intervening after judgment. To do so, however, he must timely assert his right in the district court.[21] If his application is denied, he may then appeal from the order denying intervention. If no other appeal has been taken, Moore's Federal Practice states, he "may, probably *must*, file a notice of appeal from the judgment from which he seeks to appeal within the time prescribed by

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[18] *McKenna v. Pan American Petroleum Corp.*, 303 F.2d 778, 779 (5th Cir. 1962).

[19] *Id.*

[20] *See United States v. Bursey*, 515 F.2d 1228, 1238 & n.24 (5th Cir. 1975).

[21] *See* 9 J. Moore, B. Ward & J. Lucas, Moore's Federal Practice ¶ 203.06, at 3-21 to 3-23 (1985); *see, e.g., United Airlines, Inc. v. McDonald*, 432 U.S. 385, 390, 394, 97 S.Ct. 2464, 2467, 2469-70, 53 L.Ed.2d 423, 429, 432 (1977).

Rule 4a."[22] Then, "if the court of appeals reverses the order denying intervention, it will proceed with the merits."[23] On the other hand, "[i]f it affirms denial of intervention, it will dismiss the appeal from the judgment on the merits on ground of want of standing."[24]

Faced with a case similar to the one before this court, the District of Columbia Circuit held the appeal in abeyance and remanded the case to the trial court for its determination of the right to intervene.[25] In this case, district court has considered the motion, decided it, and an appeal from that decision has been taken. The validity of the district court proceedings and the merits of its decision should be considered when that appeal is heard.

II.

Hill's membership in the class does not relieve him from meeting the requirements of Rule 24(a) for interventions.[26]

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[22] 9 J. Moore, B. Ward, & J. Lucas, *supra* note 21 ¶ 203.06, at 3-22 (emphasis in original); *see, e.g., United Airlines, Inc. v. McDonald*, 432 U.S. 385, 390, 97 S.Ct. 2464, 2467, 53 L.Ed.2d 423, 429 (1977).

[23] 9 J. Moore, B. Ward & J. Lucas, *supra* note 21 ¶ 203.06, at 3-22; *cf. Stallworth v. Monsanto Co.*, 558 F.2d 257, 263 (5th Cir. 1977); *United States v. American Tel. & Tel. Co.*, 642 F.2d 1285, 1290 (D.C. Cir. 1980); *Gregory-Portland Indep. School Dist.*, 576 F.2d 81, 83 (5th Cir. 1978) (Godbold, J., concurring), *cert. denied*, 440 U.S. 946, 99 S.Ct. 1423, 59 L.Ed.2d 634 (1979).

[24] 9 J. Moore, B. Ward & J. Lucas, *supra* note 21 ¶ 203.06, at 3-22 to 3-23; *cf. Pennsylvania v. Rizzo*, 530 F.2d 501, 508 (3d Cir.), *cert. denied sub nom., Fire Officers Union v. Pennsylvania*, 426 U.S. 921, 96 S.Ct. 2628, 49 L.Ed.2d 375 (1976); *Jones v. Caddo Parish School Bd.*, 735 F.2d 923, 938 (5th Cir. 1984) (en banc).

[25] *See Hobson v. Hansen*, 44 F.R.D. 18, 21 (D.D.C. 1968).

[26] *See* 7A C. Wright & A. Miller, *Federal Practice and Procedure* § 1799, at 252-55 (1972).

Only if Hill meets those requirements may he intervene as a named party to this case.

A class member may intervene without displacing the class representatives. He may, however, choose another, and different, course: he may seek to have the designated class representatives removed for failure adequately to represent the class and seek to have himself designated as class representative. Hill does not dispute that the class representatives adequately represented the class in the trial court. His sole assertion of inadequacy is their failure to appeal. The class representatives' failure to appeal is a factor, but only a factor, in deciding whether their representation is adequate.[27] Hill has never demonstrated that by failing to appeal they have failed "fully and adequately to protect the interests of the class" as a whole, as required by Rule 23(a), as qualified by Rule 23(b)(2), the class action rules, or that as required by Rule 24, the intervention rule, Hill's interest as a state official has not been adequately represented by them.

To determine whether the representatives have adequately represented the interest of the class as a whole, and consequently Hill's interest as a member of that class, we must define that interest. Danny Hill has no personal interest in this case, and indeed no member of the class has any personal interest in it. Hill's only interest, as he admits, stems from his office as District Attorney, and he seeks to appear before us only in that official capacity. No money judgment has been or will be rendered against him, even for costs, as a represen-

[27] *Compare Smuck v. Hobson*, 408 F.2d 175, 181 (D.C. Cir. 1969), *with Spangler v. Pasadena City Bd. of Educ.*, 427 F.2d 1352, 1354 (9th Cir. 1970), *cert. denied sub nom., Alexander v. Pasadena City Bd. of Educ.*, 402 U.S. 943, 91 S.Ct. 1607, 29 L.Ed.2d 111 (1971); *see also* 7A C. Wright & A. Miller, Federal Practice and Procedure § 1909, at 532 (1972).

tative in his official capacity.[28] No judgment has been entered against him in his personal capacity.

That a district attorney is a proper official to represent the state for some purposes cannot be doubted. The issue here, however, is whether the interests of the state and of the class have been adequately and fully represented. In this respect the other class members have an interest identical to Hill's and indeed identical to the State's, for, in their official capacities, they have no interest greater than or different from the State's interest.[29] None of them has offered to us any indication of dissatisfaction with the action of their representatives.

The real party in interest[30] is the State of Texas, for it is the facial constitutionality of a state statute that is at issue. Whether the Texas Attorney General has power to prosecute for crimes and whether, in the absence of the Attorney General, suit to challenge the constitutionality of a state statute might be brought in federal court against some other official are not at issue here and are indeed irrelevant. Neither the Texas Constitution nor the two cases cited by the majority[31] give a district attorney authority to act for the state in a declaratory judgment action in federal court in which the Attorney General has intervened to protect the state's interest, and they do not dictate to a federal appellate court whether representation of the state's or the class members' interests has been adequately

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[28] *See Kentucky v. Graham*, —— U.S. ——, ——, 105 S.Ct. 3099, 3104, 87 L.Ed.2d 114 (1985); *Brandon v. Holt*, —— U.S. ——, ——, 105 S.Ct. 873, 878, 83 L.Ed.2d 878, 885 (1985); *Hutto v. Finney*, 437 U.S. 678, 699-700, 98 S.Ct. 2565, 2578, 57 L.Ed.2d 522, 539-540 (1978).

[29] *See* cases cited *supra* note 28.

[30] *See New Orleans Pub. Serv., Inc. v. United Gas Pipe Line Co.*, 732 F.2d 452, 464 (5th Cir.) (en banc), *cert. denied sub nom., Morial v. United Gas Pipe Line Co.*, —— U.S. ——, 105 S.Ct. 434, 83 L.Ed.2d 360 (1984).

[31] *State v. Gary*, 163 Tex. 565, 359 S.W.2d 456, 458 (1962); *Shepperd v. Alaniz*, 303 S.W.2d 846 (Tex.Civ.App. — San Antonio, 1957, no writ).

undertaken. When both the State's Attorney General and the class representatives have decided that it is not in the state's interests to appeal, it is not the province of any one of the 1085 district, county, and city attorneys of the State to do so on the a priori basis that all others are out of step and that he alone knows the state's true interest.

In deciding who should speak for the state, it is important to consider the result of an adverse judgment against the state on appeal. Not only might the decision of the district court be affirmed[32] but the state might be required to pay the costs of appeal, including the attorney's fees taxable under § 1988.[33] If Hill or any of the multitude of prosecuting attorneys may take it on himself to appeal an adverse ruling, the expense would not fall on Hill or on the other Horatius at the constitutional bridge or on his city or county but on the state.[34]

Whatever Hill's interest in this case may be, it arises solely out of his official capacity as Potter County Attorney, as Hill states in his en banc reply brief. Hill asserts that his official interests have been inadequately represented by the class representatives and the State's Attorney General. The burden of proof, however slight, is on him.[35] He has not borne it.

IV.

Soon after the founding of the Republic, the Supreme Court indicated that the power of judicial review should be exercised

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[32] *Cf. Hardwick v. Bowers*, 760 F.2d 1202 (11th Cir. 1985).

[33] 42 U.S.C. § 1988.

[34] *See Brandon v. Holt*, —— U.S. ——, 105 S.Ct. 873, 878, 83 L.Ed.2d 878 (1985); *Hutto v. Finney*, 437 U.S. 678, 699-700, 98 S.Ct. 2565, 2578, 57 L.Ed.2d 522, 539-540 (1978); *Crane v. Texas*, 759 F.2d 412, 432 (5th Cir. 1985), *reh'g denied*, 766 F.2d 193, 194 (5th Cir. 1985).

[35] *See Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10, 92 S.Ct. 630, 636 n.10, 30 L.Ed.2d 686, 694 n.10 (1972); *Bush v. Viterna*, 740 F.2d 350, 355 (5th Cir. 1984).

reluctantly, only because it is essential to the decision of the case before a federal court and because the Constitution and the laws of the United States, as the "Supreme Law of the Land," require it.[36] The justification for federal judicial review of the constitutionality of a federal or state legislative enactment rests upon these principles. As a corollary, the Supreme Court has espoused and this court has followed the prudential principle that a federal court should not and will not reach a constitutional question if it can rest its decision on nonconstitutional grounds.[37] As we stated in *Ramsay v. Bailey*,[38] "[h]owever novel and interesting may be these constitutional claims, it is our duty to decide this case on other grounds if possible."[39] The principle applies with equal force whether decision on the merits would uphold or reject constitutionality. If judicial restraint is a doctrine invoked only to achieve a desired result but to be ignored when following it would not be expedient, it ceases to be a principle and becomes but another rationalization by which judges may achieve their purpose.

Whether the Attorney General, District Attorney Wade, and City Attorney Holt have acted wisely or well in the interests

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[36] *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 2 L.Ed. 60 (1803); *see also Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 4 L.Ed. 97 (1816).

[37] *See Gulf Oil Co. v. Bernard*, 452 U.S. 89, 99, 101 S.Ct. 2193, 2199, 68 L.Ed.2d 693, 702 (1981); *Rescue Army v. Municipal Court*, 331 U.S. 549, 568-75, 67 S.Ct. 1409, 1419-23, 91 L.Ed. 1666, 1677-81 (1947); *Ashwander v. TVA*, 297 U.S. 288, 346-48, 56 S.Ct. 466, 482-84, 80 L.Ed. 688, 710-11 (1936) (Brandeis, J., concurring); *Ratcliff v. Estelle*, 597 F.2d 474, 478 (5th Cir.), *cert. denied*, 444 U.S. 868, 100 S.Ct. 143, 62 L.Ed.2d 93 (1979); *Universal Amusement Co. v. Vance*, 587 F.2d 159, 166 (5th Cir. 1978) (en banc), *aff'd*, 445 U.S. 308, 100 S.Ct. 1156, 63 L.Ed.2d 413 (1980); *Ramsay v. Bailey*, 531 F.2d 706, 707 (5th Cir. 1976), *cert. denied*, 429 U.S. 1107, 97 S.Ct. 1139, 51 L.Ed.2d 559 (1977).

[38] 531 F.2d 706 (5th Cir. 1976), *cert. denied*, 429 U.S. 1107, 97 S.Ct. 1139, 51 L.Ed.2d 559 (1977).

[39] *Id.* at 707.

of the State or in the interests of their constitutents, are questions to be decided by the Texas electorate and by the institutions of Texas government.[40] It has not been properly shown that they have inadequately represented the interests of the State that they were elected to serve or the interests of the class that they were appointed to represent. From the decision to permit Danny Hill, in his official capacity as District Attorney of Potter County, one of 254 Texas counties, to intervene on appeal and to prosecute this appeal, I respectfully dissent.

[40] *See Baker v. Carr*, 369 U.S. 186, 217, 82 S.Ct. 691, 710, 7 L.Ed.2d 663, 685 (1962).

Appendix B.

Donald F. BAKER, Plaintiff,

v.

Henry WADE, District Attorney of Dallas County, Texas, in his official capacity; and Lee Holt, City Attorney of Dallas, Texas, in his official capacity; and the Class of all City, County and District Attorneys in the State of Texas, in their official capacities, Defendants.

Civ. A. No. 3-79-1434-R.

United States District Court,
N.D. Texas,
Dallas Division.
Aug. 17, 1982.

MEMORANDUM OPINION

BUCHMEYER, District Judge.

This is a suit by a homosexual, Donald F. Baker, attacking the constitutionality of § 21.06 ("Homosexual Conduct") of the Texas Penal Code. Section 21.06 (and the related definitions in §§ 1.05 and 21.01) provide:

> "A person commits an offense if he [or she] engages in deviate sexual intercourse with another individual of the same sex.
>
> "'Deviate sexual intercourse' means any contact between any part of the genitals of one person and the mouth or anus of another person."

A violation of this statute is a "Class C misdemeanor," punishable only by "a fine not to exceed $200." Tex.Penal Code Ann. § 12.23 (Vernon 1974).

The defendants contend that § 21.06 is constitutional because it furthers the state's interests in protecting "morality, decency, health, welfare, safety, and procreation" — but, despite these important state interests, they also claim that the case should be dismissed because no one is ever prosecuted under this statute.

There have been (and will continue to be) prosecutions of both homosexuals and heterosexuals — *under Texas Penal Code provisions not involved in this suit* — for such sexual offenses as (i) rape and sexual abuse by force, §§ 21.02 and 21.04; (ii) indecent exposure or public lewdness, §§ 21.07 and 21.08; and (iii) rape, sexual abuse or fondling of a child, §§ 21.09-21.11.

However, § 21.06 does not concern rape, sexual abuse by force, offenses involving minors, or sexual conduct in public. Nor does it prohibit sodomy between a husband and wife or between an unmarried male and female. Instead, it condemns only homosexual conduct done in private between consenting adults. Accordingly, it is unconstitutional because it violates both the fundamental right of privacy and the right to equal protection of the laws guaranteed to the plaintiff (and other homosexuals) by the United States Constitution.

This opinion will first discuss the procedural background of the controversy, the sodomy statute involved, and the facts established at trial (pages 1125-1134). Then, it will analyze the legal issues of right of privacy and equal protection (pages 1134-1145). Finally, it will deal with several additional matters raised by the parties (pages 1145-1147), and conclude by describing the exact limits of this decision (pages 1147-1148).

The Procedural Setting

The complaint seeks a declaration that § 21.06 (Homosexual Conduct) of the Texas Penal Code is unconstitutional because it violates (i) the plaintiff's fundamental right to privacy, (ii) the equal protection clause of the fourteenth amendment, and (iii) the establishment of religion clause of the first amendment.

It named as defendants Henry Wade, District Attorney of Dallas County ("Dallas County") and Lee Holt, City Attorney of Dallas, Texas ("City of Dallas") — but also sought a defendant class, under Fed.R.Civ.P. 23(b)(2), consisting of "all district, county and city attorneys in the State of Texas responsible for the enforcement of Texas Penal Code Ann. § 2106." After the State of Texas intervened, the parties agreed that such a defendant class was proper. A consent certification order was entered, and the Court reaffirms its determination that the defendant class was properly certified.[1]

The Statute

Texas has had three sodomy statutes. See Appendix A ("The Texas Sodomy Laws").

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[1] The four requirements of Rule 23(a) — "numerosity, commonality, typicality and adequacy" — have been met. There are several hundred public prosecutors in Texas who have jurisdiction to enforce § 21.06. Plaintiff's claims against the named defendants are common to and typical of his claims against the defendant class — that they all enforce an unconstitutional law and that, during his regular travels throughout the state, he faces the threat of prosecution under § 21.06. Defendants Holt and Wade are adequate representatives of the class, and no conflicts exist between them and other class members. In addition, approximately 40 district, county and city attorney's offices (including those in major metropolitan areas) were advised by defendant Holt that they should intervene in this suit by September 1, 1980, but none of them chose to do so. The members of the class act on "grounds generally applicable to the class" in enforcing a law claimed to be unconstitutional, making final injunctive relief appropriate "with respect to the class as a whole." Accordingly, the defendant class was properly certified under Fed.R.Civ.P. 23(a) and 23(b)(2).

The first was enacted in 1860. It prohibited "the abominable and detestable crime against nature" (punishable by 5-15 years imprisonment). However, this statute did not condemn oral sex, but only anal sex and bestiality.[2] Thus, for a period of 83 years, oral sodomy was not illegal in Texas — whether committed by man and wife, by unmarried male and female, or by homosexuals.

The second statute was Article 524, Texas Penal Code Ann., adopted in 1943. It prohibited "carnal copulation" with human or beast (punishable by 2-15 years imprisonment), and condemned *all* oral and anal sex and bestiality. Thus, for the next 31 years, it was a felony for *anyone* in Texas — married couples, single males and females, male homosexuals or lesbians — to engage in oral or anal sodomy, even in private with another consenting adult.[3]

The third statute, § 21.06, was passed in 1974 as part of the first comprehensive reform of the state's criminal laws since the initial penal code had been enacted in 1856. It prohibited only homosexual sodomy. All prohibitions against oral or anal sex between consenting adults of opposite sex, whether married or not, were rescinded (as were criminal laws against fornication and adultery). Thus, for the past 8 years in Texas, only homosexuals have been prohibited from engaging in private, consensual sodomy (although punishment was drastically reduced by § 21.06, with no imprisonment and a maximum fine of $200). At least three sessions of the Texas legislature

[2] See Appendix A; *Pruett v. State*, 463 S.W.2d 191 (Tex. Cr. App. 1971), appeal dismissed for want of substantial federal question, 402 U.S. 902, 91 S.Ct. 1379, 28 L.Ed.2d 643 (1971).

[3] As discussed in Appendix A, this statute (Article 524) was held unconstitutional by a three-judge federal court, *Buchanan v. Batchelor*, 308 F.Supp. 729 (N.D. Tex. 1970), reversed and remanded on other grounds, 401 U.S. 989, 91 S.Ct. 1222, 28 L.Ed.2d 526 (1971) — but the Texas Court of Criminal Appeals declined to follow this decision and held that Article 524 was constitutional, *Pruett v. State*, 463 S.W.2d 191.

have rejected attempts to repeal § 21.06, and this is the first *direct* constitutional attack upon it.[4]

There are practical difficulties in prosecuting persons under § 21.06 for private homosexual conduct. If the acts are between two people in private, there may be no witness to testify at trial. Moreover, "the consenting parties to acts of sodomy are equally guilty and their testimony as witnesses for the state would require corroboration."[5]

However, homosexuals have in fact been prosecuted under the Texas sodomy statutes.[6] And, the parties in this case stipulated in the final pretrial order that the plaintiff is "an admitted practicing homosexual"; that he has not been arrested or prosecuted for a violation of § 21.06; but that cases involving violations of this statute "have been prosecuted by various assistant city attorneys and assistant district attorneys" in Dallas; and that both defendants "would prosecute the plaintiff and other homosexuals under § 21.06 if a provable violation of the law came to their attention."

The Facts

The following summary of the testimony of the plaintiff, the plaintiff's experts, and the defendants' witnesses constitutes this Court's findings of fact under Fed.R.Civ.P. 52 (a).

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[4] See Appendix A; *Cyr v. Walls*, 439 F.Supp. 697 (N.D. Tex. 1977); *Childers v. Dallas Police Dept.*, 513 F.Supp. 134 (N.D. Tex. 1981), affirmed without opinion, 669 F.2d 732 (5th Cir. 1982).

[5] *Pruett v. State*, 463 S.W.2d at 193. Apparently, no married couples were ever prosecuted under Article 524 because of these reasons — and also because "neither spouse would be competent to testify against the other by reason of their relationship as husband and wife" (463 S.W.2d at 193).

[6] *See, e.g., Buchanan v. Batchelor*, 308 F.Supp. 729. David Rosen, a former assistant city attorney, testified that a case could be prosecuted under § 21.06 if a "credible" witness observed the private acts of sodomy. Also, § 21.06 might be used by the state if there is some doubt about whether the acts of sodomy occurred "in a public place" under § 21.07 (Public Lewdness).

the plaintiff

Donald F. Baker, 35, is a former Dallas school teacher w
received his master's degree in education from Southe
Methodist University in 1980. He has never been arrested
convicted of any criminal offense. He is an active and devo
Christian. And, he is a good citizen, having served as preci
chairman and as a delegate to two state Democratic Pa
conventions.

But Donald Baker is a homosexual. He has never had s
with a woman, or even been sexually aroused by a fema
He does engage in private sexual acts with other adult mal
but is not capable of doing so with females. Therefore, *Dona
Baker is also a criminal* under § 21.06 of the Texas Penal Coc

Baker was a very sincere, very credible witness.[7] While
parents listened in the courtroom, Baker gave the followi
testimony about his adolescent ignorance of his homosexualit
his disgust and self-loathing upon recognition of it, his isolati
and suffering, his suicidal tendencies, and his eventual chan
from a "homosexual" into a "gay."[8]

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[7] Although people tend to stereotype homosexuals, just as they do corpor
executives and truck drivers, "contrary to the frequently held notion that
homosexuals are alike, they are in fact very heterogeneous." National Instit
of Mental Health Task Force on Homosexuality, p. 2 (Oct. 1969) (admit
as plaintiff's exh. 21 and hereinafter cited as "Task Force on Homosexuality
During trial, Donald Baker dressed conservatively, was very articulate, a
had the appearance that most people might expect of a school teacher or ba
executive.

[8] According to Baker, a "homosexual" is one who has an emotional, ero
attachment to one of the same sex — while a "gay" is one "who is proud
being a homosexual." *See Cyr v. Walls*, 439 F.Supp. 697, 699 n.2.

Baker was born on April 24, 1947, into a very stable and religious family in Dallas. His grandfather had been an Assembly of God minister, and Baker was very active in this church. He was a leader in various youth activities, including the church choir and the boy scouts. During his junior high school years, when Baker was 13 or 14, he started to become aware that he was somehow "different." Although he dated some girls because of peer pressure, he found this awkward. He began realizing that he had strong feelings for his male friends, but could not understand his frustration and loneliness. He knew that "queers were bad," and had no idea that he might be homosexual.

In 1965 Baker graduated from high school and attended East Texas State University. There, he became even more aware that he was "different." He did "some study" of the "general area of homosexuality," and learned it was illegal. He grew very disappointed in himself, and simply could not understand why he was having feelings that were "wrong" and "criminal" and "sinful."

After two years at East Texas (1965-67), Baker transferred to the University of Texas at Austin. There, he continued his church activities and worked at a campus bookstore. He had never engaged in any homosexual conduct and still did not know he was homosexual. Then, in November of 1967 — when Donald Baker was 20 — he had his first homosexual "experience."

On that day, Baker took a break from work at the bookstore to watch a football game on television in the student union. The room was crowded and Baker soon became aware of a man standing next to him. After a while, Baker looked up, and the man — blond, early twenties, medium height — was staring at Baker, with a look that was "erotic." Baker felt intense anxiety and attraction. He followed the man to the rest room, but nothing happened. Baker refused the man's advances, and returned to work, where he broke into sobs.

Baker was overwhelmed with fear and with disgust. He knew his desires for sexual contact with the man were wrong, and were contrary to his family and religious values. Baker felt he was a "dirty, nasty thing." He left work, and went to sing in the church choir, but broke down there, too. He tried to talk to his minister, but could not bring himself to tell the minister what was really wrong.

After that day, Baker cut himself off from the world. He refused to open the door to his room or answer the phone for over two weeks. Baker was afraid he had a "disease" and might contaminate others. He was sure that "God hated him" and that "society hated him" and that "his family hated him." In May of 1968, Baker joined the Navy because "he needed to run away from what he was."

Baker had not engaged in any homosexual conduct while in college, nor would he do so while he was in the Navy. He served in the Navy for four years (1968-72), with an excellent record. During this time, Baker continued to attend church and agonized about "what he was." He knew that if he was homosexual, then "he wouldn't have a job, his family would reject him, and he would burn in hell." Baker prayed for deliverance.

In January of 1972, Baker was honorably discharged. He came home to Dallas, but had a "terrible fear," and left after only two weeks to live with friends in Massachusetts. During the next two years, Baker felt isolated and rejected — his suffering and disgust continued — and he seriously considered suicide. Baker still had not engaged in any homosexual conduct. In 1974, he enrolled at the State University of New York in Cortland, continuing his studies in elementary and secondary school education (graduating cum laude in 1975).

One day Baker decided to attend a meeting of a gay organization at Cornell University in Ithaca, thirty miles away. He was nervous, and walked around the Cornell campus for about

an hour. Finally, he sneaked into the building, and stood hidden on a balcony where he could see the meeting down below. It was the first time Donald Baker had ever seen other human beings that he knew were homosexual, too, but who were not ashamed of that fact.

At age 27, Donald Baker was starting "to come out of the closet." He became acquainted with other "gays," and "learned that that they were were not monsters." During the next year, he studied history, sociology and psychology; he re-examined the Bible and satisfied himself that he could be a devout Christian as well as a homosexual; and he gradually "came to terms with the fact that he was homosexual," although he was still discreet in telling others.

In 1975, Baker returned to Dallas and "came out" to his family, admitting to them that he was homosexual. He obtained a job with the Dallas Independent School District, and taught there for four years (1975-1979) as a language arts and social studies teacher in grades 4-6. His private life as a homosexual did not adversely affect his job performance or his abilities as a teacher.[9] Indeed, Baker was recognized by DISD as an excellent teacher.[10] And, when Baker left DISD in 1979 to return

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[9] During the period he taught at DISD, Baker did engage in sexual conduct with other males in private at his home. However, he was never sexually attracted to any students and never had any sexual contact with them. He did not advocate homosexuality to the students. Instead, he lived in fear and anxiety of being "discovered" — because the DISD Superintendent had stated publicly that he would fire any homosexual teachers. A school board member testified that Baker would have been fired if there had even been a suspicion that he had violated § 21.06.

[10] Baker's evaluations included these comments: "Mr. Baker is an asset to our school. He has done a good job for us this year. Potential of being an excellent teacher" (1976) . . . "An excellent teacher. He is well liked by students, parents, and co-teachers" (1977) . . . "He has done a good job. He is becoming an excellent teacher, a hard and dedicated worker" (1978). See plaintiff's exh. 1.

to Southern Methodist University to work on his master' degree, the School District recommended him for the teachin fellowship which he was awarded.

Before completing his master's degree, Baker became ac tively involved in gay rights organizations. In 1979, he becam Vice-President of the Dallas Gay Political Caucus and, i November of that year, this suit was filed. In 1980, the nam of the organization was changed, and Baker became Presider of the Dallas Gay Alliance. He is also active on state an national levels.[11]

Baker also testified that he will continue to engage in privat homosexual conduct in violation of § 21.06, but has no inten tion of doing so in public . . . that he does not desire or nee psychiatric treatment . . . that § 21.06 does have serious ef fects upon homosexuals because it makes them criminals . . that this "stigma" encourages police harassment of homosex uals and results in discrimination against homosexuals by em ployers, apartment owners, domestic relations courts (in chil custody matters), and others.

the plaintiff's experts

The two principal expert witnesses[12] presented by the plain tiff were Dr. Judd Marmor, a psychiatrist, and Dr. Willian

[11] Baker travels frequently throughout the state in connection with thes activities — particularly to Houston and Austin — and, consequently, woul be subject to prosecution under § 21.06 in other cities besides Dallas.

[12] Through another expert, Dr. Victor Furnish, a theologian and professo of the New Testament at S.M.U. (plaintiff's exh. 3), the plaintiff introduce a number of resolutions by church bodies condemning the repression o homosexuality and urging repeal of statutes like § 21.06 (plaintiff's exh. 10) Dr. Furnish testified that, in his expert opinion, the Bible does not condem *consensual* homosexual conduct. He noted that there is no reference to homosex uality in the Ten Commandments; that Christ made no statements abou homosexuality; and that homosexuality was not a "prominent biblical concern

Simon, a sociologist. Both had studied and written extensively in the area of homosexuality and they are experts in this field. Their qualifications were impeccable (see plaintiff's exhs. 2, 4) and their testimony established the following facts:

Section 21.06 makes "criminals" of a substantial number of individuals in Texas. At least 5% of American males are "exclusive" or obligatory homosexuals[13] — who have no heterosexual experiences and who have no desire to change. This means that there are at least 500,000 exclusive homosexual males in Texas. In addition, some 2-3% of the females in Texas (or, approximately 130,000-200,000) are exclusive lesbians.[14]

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since it is the subject of only a few passages. Dr. Furnish interpreted the story of Sodom as an "intended gang rape" of the strangers (the two angels in Lot's house), and thus a condemnation of violence and force, not consensual homosexual conduct. He gave a similar interpretation to the two passages in Leviticus—*Leviticus* 18:22: "Thou shalt not lie with mankind, as with womankind: it is abomination." *Leviticus* 20:13; "If a man also lie with mankind, as he lieth with a woman, both of them have committed an abomination: they shall surely be put to death; their blood shall be upon them"—and also noted that neither the Bible nor these passages "say anything about female homosexuality." However, Dr. Furnish conceded that other biblical scholars may disagree with his opinions and that, in fact, many religions do condemn homosexuality.

[13] Under the "Kinsey scale,"—which begins with category 0 (exclusively heterosexual)—category 6 is "exclusively homosexual" (no heterosexual experiences, obligatory) and category 5 is "more or less exclusively homosexual" (only incidental heterosexual experiences, with no desire to change, obligatory). The figures given in this opinion are for categories 5 and 6, combined, since these are considered "exclusive homosexuals." However, among the 95% of American males who are not "exclusive homosexuals," 15-20% do engage in some homosexual activites. For example, individuals whose heterosexual preference is predominant may, under certain circumstances (such as imprisonment), become involved in homosexual behavior. *See* Force on Homosexuality, p. 2 (plaintiff's exh. 21) (Dr. Judd Marmor was a member of this Task Force and helped write the report).

[14] These numbers may be even higher. According to the magazine article introduced as Defendant Wade's Exhibit 1, the revolutionary Kinsey survey—which revealed a surprising level of homosexual behavior not previously known

These "exclusive homosexuals" did not choose to be homosexuals. Obligatory homosexuality is not a matter of choice: it is fixed at an early age—before one even begins to participate in sexual activities—and only a small minority can be changed or "cured," if at all. Although there are different theories about the "cause" of homosexuality, the overwhelming majority of experts agree that individuals become homosexuals because of biological or genetic factors, or environmental conditioning, or a combination of these and other causes—and that sexual orientation would be difficult and painful, if not impossible, to reverse by psychiatric treatment.

Indeed, homosexuality is not a "disease" and it is not, in and of itself, a mental disorder.[15] Although society—and courts—may still grapple with this question, in 1973 the American Psychiatric Association removed homosexuality from its list of psychic disorders, resolving that "homosexuality per se implies no impairment in judgment, stability, reliability or general social or vocational capabilities" and that "*in the reasoned judgment of most American psychiatrists today, homosexuality per se does not constitute any form of mental disease*" (plaintiff's exh. 5). In 1970, 1973 and 1975, respectively, the American Anthropological Association, the Ameri-

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and which has been confirmed by later studies—estimated that 10% of the American men, and approximatley 3-5% of the women, were exclusively homosexual. This would mean that there may be over 650,000 exclusive homosexual males and as many as 200-300,000 exclusive homosexual females in Texas. Kinsey also estimated that 50% of all American males have had homosexual experiences. Ennis, "What Do These Rugged Texas He-Men Have in Common?," Texas Monthly (June 1980), pp. 107-113, 209-226 (hereinafter cited as "Texas Monthly"). The plaintiff testified that the statements made about him in this article were basically correct.

[15] Dr. Marmor testified that homosexuality was not "contagious" or infectious; that, although there was "some disagreement," almost all American psychiatrists feel that "homosexuality per se does not constitute any form of mental disorder"; and that there is no respected medical literature to the contrary.

can Bar Association,[16] and the American Psychological Association adopted similar resolutions (plaintiff's exhs. 6, 8, 9). And, in 1975, even the American Medical Association resolved (plaintiff's exh. 7):

> "That the American Medical Association support in principle repeal of laws which classify as criminal any form of non-commerical sexual conduct between consenting adults in private, saving only those portions of the law which protect minors, public decorum, or the mentally incompetent."

Each of these resolutions urged the repeal of statutes which, like § 21.06, prohibit only private sexual conduct by consenting adults. If this were done—i.e., if there was a "decriminalization" of homosexual acts in private by consenting adults—this would not result in an increase in homosexuality. In some countries (e.g., England, France, Holland, Finland), homosexual conduct has been decriminalized for years, and there is no greater incidence of homosexuality in those countries than in the United States. Moreover, there have been no adverse side effects in the 21 states that have now decriminalized consensual sodomy between adults in private.[17]

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[16] The American Law Institute in its Model Penal Code recommended that criminal statutes covering sexual conduct "be recast in such a way as to remove legal penalties against acts in private among consenting adults." *See* Task Force on Homosexuality, p. 6 (plaintiff's exh. 21); *Buchanan* v. *Batchelor*, 308 F.Supp. 729, 732 (N.D.Tex.1970), rev'd on other grounds *sub nom. Buchanan* v. *Wade*, 401 U.S. 989, 91 S.Ct. 1222, 28 L.Ed.2d 526 (1971).

[17] The 21 state statues are attached to the plaintiff's "Motion that Judicial Notice Be Taken of Certain State Sodomy Laws." *See also* Rivera, "Our Straight-Laced Judges: The Legal Position of Homosexual Persons in the United States," 30 Hastings L.J. 799, 950-51 (which indicates that 22 states have passed such "decriminalization" statutes).

There is no basis to assume that criminal laws (like § 21.06) reduce the number of homosexuals. Persons do not choose homosexuality, and only a small percentage of exclusive homosexuals can be cured or changed. Criminal sanctions do not deter homosexual sodomy—because "sex, next to hunger and thirst, is the most powerful drive that human beings experience," and it is unrealistic to think that such laws will force total abstinence. Moreover, homosexuality has never been stamped out by criminal laws; it has been common in almost every type of society, at all economic levels and among all ethnic and cultural groups.

In addition, the existence of these criminal laws, even if they are not enforced (like § 21.06), does result in stigma, emotional stress and other adverse effects. The anxieties caused to homosexuals—fear of arrest, loss of jobs, discovery, etc.—can cause severe mental health problems. Homosexuals, as criminals, are often alienated from society and institutions, particularly law enforcement officials. They do suffer discrimination in housing, employment and other areas.

Neither Dr. Marmor nor Dr. Simon could find any legitimate state interest to justify statutes like § 21.06. Although "homophobia"—an exaggerated fear of homosexuals—may exist among many heterosexuals, there is no rational basis for this. The vast majority of sex crimes committed by adults upon children are heterosexual, not homosexual.[18] Homosexuals do not have a criminal propensity simply because they are homosexuals, any more than heterosexuals do. Homosexuals are not ill or mentally diseased. And, homosexuality in society does not adversely affect the growth and development of children.[19]

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[18] *See* "Responding to Child Sexual Abuse: A Report to the 67th Session of the Texas Legislature" (Sam Houston State Univ., Criminal Justice Center 1980) (introduced as plaintiff's exh. 12).

[19] Dr. Marmor was cross-examined about a statement he made in the book *Sexual Inversion* that "Psychiatric intervention is prophylactically indicated for

Accordingly, both of the plaintiff's experts felt there was no rational basis and no state interest that would justify § 21.06. The Court credits the testimony and the opinions of Dr. Marmor and Dr. Simon, particularly since they were uncontradicted—except, as next discussed, by *part* of the testimony of the defendants' "expert."

the defendants' witnesses

The defendants presented Dr. James Grigson, a psychiatrist primarily engaged in what he termed "legal psychiatry,"[20] as an expert witness. It was his opinion "that the members of society, including the homosexual individuals, do benefit from the law [against homosexual conduct] which we have here in the state of Texas." He did not explain how "members of society" benefited from § 21.06, but testified specifically that it was helpful to children and to homosexuals because:

(i) As to *children*, § 21.06 "primarily reinforces their own super-ego or conscience" and thus fosters their "growth

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children or adolescents who seem to be failing to make appropriate gender role identifications." He explained that sexual preference is fixed at an early age (probably before age 6), and that "highly effeminate children"—who are vilified by their peers and badly traumatized "in society that regards homosexuality as an undesirable behavioral deviation"—may benefit from psychiatric treatment. His explanation was credible, and his testimony as a whole clearly established that the normal growth and development of children was not fostered by laws which make homosexual conduct illegal.

[20] Dr. Grigson explained that "legal psychiatry" revolves around "determination of competency, sanity, likelihood of making probation of defendants, occasional civil cases involving psychiatric questions, occasional probate cases involving competency of an individual to make a will." He spends about 20% of his time testifying on behalf of the District Attorney's office in criminal cases, and appeared in over 100 criminal cases in *each* of the past four years (1977-1980), an average of three times per week. Dr. Grigson also teaches psychiatry part-time at Southwestern Medical School in Dallas.

and development" by reinforcing "the culture of society's norm pattern or expected pattern of behavior."

(ii) As to *homosexuals*, "if sodomy was decriminalized, it would be harmful to the homosexual, because it would result in a lessening in terms of those individuals going ahead and seeking help and resolving their problems."

Dr. Grigson also testified that, in his opinion, homosexuals "are less stable and have more pathological emotional mental illnesses than the general population as a whole"—and that "homosexuality is an illness and a disease and that certainly homosexual behavior is deviant behavior."[21]

This Court completely discounts Dr. Grigson's testimony and his opinions.[22] These opinions were not based upon any independent research or supported by "any respected medical or psychiatric literature." Indeed, Dr. Grigson had personally treated only 40-50 homosexuals in his 19-year practice (although he had seen "a far larger number" just for the purpose of doing evaluations on them)[23]— and he could not name any

[21] According to Dr. Grigson, this is true of *all* homosexuals, not just exclusive or obligatory homosexuals; "regardless of whether they want [heterosexual relationships] or don't want them, they're still, if they are homosexual, suffering from an illness."

[22] In making this determination, this Court has—in addition to the matters discussed above—considered all of the circumstances under which the witness testified, including his relationship to the District Attorney's office (see note 20) and the extent to which he was supported or contradicted by other credible evidence. No weight was given to the fact that Dr. Grigson had been reprimanded by the American Psychiatric Association on a collateral matter. *See Estelle* v. *Smith*, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981). There was nothing to show that Dr. Grigson was not a competent psychiatrist; however, he was not a credible witness concerning homosexuality and laws condemning homosexual conduct.

[23] Dr. Grigson was tendered as an expert because of his experience in diagnosis and treatment "of sexual disorders or conditions relating to sexual problems," including the diagnosis or treatment "of individuals who had problems relating to homosexuality."

other psychiatrist who shared his opinion "that homosexuality or private homosexual conduct between consenting adults ought to be criminalized."

Moreover, Dr. Grigson's opinions were directly contrary to those of the plaintiff's experts[24]—whose qualifications as experts in the field of homosexuality were outstanding and whose testimony was very credible—and to positions adopted by various medical and psychiatric associations. For example, Dr. Grigson disagreed with the American Psychiatric Association resolution that "homosexuality per se does not constitute any form of mental disease"—and with the American Medical Association resolution supporting "repeal of laws which classify as criminal any form of non-commercial sexual conduct between consenting adults in private." And, even standing alone Dr. Grigson's "opinions" were flawed, inconsistent, and directly contrary to other credible evidence accepted by the Court:

> (i) As to *children*, Dr. Grigson conceded that their "normal growth and behavioral patterns" are reinforced by their "parents, school, religion and churches"—but did not even attempt an explanation as to why criminal sanctions against homosexuality would also be needed to reinforce children's "super-ego or conscience." Moreover, it is a fact under the evidence in this record (Fed.R.Civ.P. 52) that "sexual preference is fixed at a very early age," probably before the age of six, and that people do not "choose" to become homosexuals. Thus, there is no basis for Dr. Grigson's opinion—which is contrary to the medical literature and the opinions of

[24] Dr. Grigson, again without any support, (i) disagreed with the plaintiff's experts that "sexual preference is fixed at a very early age," and thought that many individuals changed their sexual preferences "around puberty" or even "in later life," and (ii) disagreed that homosexuality "is a condition that is virtually unchangeable, at least in approximately 70% of the homosexual population."

"most American psychiatrists today"—that children might become homosexuals or develop homosexual tendencies unless homosexual conduct is illegal and punished by a $200 fine.[25]

(ii) As to *homosexuals*, the idea that criminal sanctions will cause such anxieties in homosexuals that they will seek psychiatric treatment and be "cured" is not only preposterous[26]—it, too, is contrary to the facts established by the credible evidence in this record (Fed.R.Civ.P. 52); persons do not choose to be homosexuals; most "exclusive homosexuals" do not want to be changed and do not seek any treatment; the "cure rate" for all homosexuals will, at best, be only 30%;[27] and criminal laws simply do not reduce the number of homosexuals in society.

In contrast to Dr. Grigson, neither of the two defendants—District Attorney Henry Wade and City Attorney Lee Holt—could even attempt to explain how § 21.06 furthers the state's interests in protecting decency, the welfare of society, procreation, morality, or any other interest. Wade testified (by deposition):

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[25] Dr. Grigson did testify that it "could be extremely harmful in terms of their sexual identification" for children to observe "homosexuals behaving in a sexual way." However, this could be prohibited—if it is not already—by specific, limited statutes dealing with sexual abuse and children. *See* Tex.Penal Code Ann. §§ 21.09-21.11 (Vernon 1974).

[26] Even the most severe criminal penalties—including death in some countries—have not ended homosexuality. The maximum penalty for homosexual conduct under § 21.06 is only a $200.00 fine—and Dr. Grigson did think "there would be more people who would be seeking treatment if the penalties were greater."

[27] The Task Report on Homosexuality p. 5 (plaintiff's exh. 21) indicates that "the current literature suggests that perhaps *one-fifth* of those exclusively homosexual individuals who present themselves for treatment are enabled to achieve some heterosexual interests and competence if they are motivated to do so."

" . . Can you explain to me how this law furthers the state interest of *decency*, if any, by prohibiting private homosexual conduct but permitting private heterosexual conduct that constitutes deviate sexual conduct, as defined by the statute?

"A. No.

"Q. You also indicate . . . that one of the purposes of this law is to further the *welfare of society*. And what I'd like to know is what kind of societal welfare is furthered by a law that intrudes into the bedroom of consenting sexual adults?

"A. I don't know of any. There may be some.

"Q. And I take it since you don't know of any, you don't know how it's furthered by the statute?

"A. No.

"Q. Do you know how this statute furthers the *welfare of society* by prohibiting homosexual sodomy but permitting heterosexual sodomy?

"A. No.

". . .

"Q. And can you explain to me how this statute furthers the state interest, if any, in *procreation* by permitting heterosexual sodomy, but prohibiting homosexual sodomy?

"A. I didn't even know it permitted either one.

"Q. What it does on its face for your information, is prohibits private deviate sexual intercourse between persons of the same sex, but by its very language and also by your answers to discovery, you've admitted that it does not prohibit private deviate sexual intercourse by members of a different sex.

"A. I don't think procreation is involved in either one of them; is it?

". . .

"Q. How does this law further *morality* of society by prohibiting private homosexual sodomy but permitting private heterosexual sodomy?

"A. I don't really know."

City Attorney Holt also testified (by deposition) that he had no knowledge of any way in which "private consenting homosexual conduct frustrates procreation" or protects the "morals" of society.

But both Wade and Holt felt the legislature "must" have had some public interest in mind or they would not have passed § 21.06. District Attorney Wade testified:

"Q. In your candid opinion with 30 years experience as a prosecutor, public prosecutor in Dallas County, do you know of any public interest, *any public interest*, period, furthered by this statute?

"A. Well, I think the legislature wouldn't have passed it if there wasn't a public interest in it.

". . .

"Q. You also indicate in your answers that one legally, or one state interest that is furthered by the statute is one of 'morals'. What state interest, if any, is there in the morality of private sexual conduct that you know of?

"A. The only thing I know, the legislature, after hearings, passed a law against it. I assume they had some public interest in it or they wouldn't have passed it."

Similarly, City Attorney Holt testified that the "legitimate interest" would have "to be for others to say because I think it has to be determined from the intent of the legislature and those to whom they looked for advice in passing these laws."

However, no legislative history is available (see Appendix A) to assist the Court in determining the intent of the legislature

in passing § 21.06—i.e., why the penalties against oral and anal sodomy between males and females were repealed, but those against private and consensual homosexual conduct were retained. Contrary to the testimony of defendants Wade and Holt, there is no evidence (indeed, even no indication) that any of the interests advanced to support § 21.06—"morality, decency, health, welfare, safety, and procreation"—were considered by the legislature when this statute was passed as part of the general revision of the Penal Code.

The same interests were advanced by the state to justify the predecessor sodomy statute, Article 524, which condemned *all* sodomy—whether by married couples, single males and females, or homosexuals.[28] If these interests (morality, decency, etc.) no long justified the prohibition against heterosexual sodomy in 1974 when § 21.06 was enacted, how did they continue to justify the condemnation of private homosexual conduct? And, if they did, were they so weakened that they no longer warranted a punishment of imprisonment (2-15 years), but only a fine of $200 or less?

In fact, the legislature did not even condemn *all* homosexual conduct by § 21.06. That staute, as passed in 1974, prohibited only contact between the genitals of one person and the mouth or anus of another of the same sex. It did not prohibit homosexuals from kissing or sexually stimulating their partner with hands and fingers. Nor did § 21.06 condemn the use of an artificial device, such as a vibrator or dildo (until an amendment in 1981 which also prohibited "the penetration of the genitals

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[28] *See Dawson v. Vance*, 329 F.Supp. 1320 (S.D.Tex. 1971). And, these same state interests (morality, decency, etc.) were the justification for the first Texas sodomy statute—even though it prohibited only anal sodomy and did not condemn oral sex by homosexuals or heterosexuals. *See Pruett v. State*, 463 S.W.2d 191 (Tex.Cr.App.—1971), appeal dismissed for want of substantial federal question, 402 U.S. 902, 91 S.Ct. 1379, 28 L.Ed.2d 643 (1971); *Prindle v. State*, 31 Tex.Cr.R. 551, 21 S.W. 360 (1893).

or the anus of another person with an object"). Because these—and other puzzling inconsistencies in the Penal Code[29]—it seems likely that political considerations motivated the legislature in passing § 21.06.[30]

The Law

The following discussion cosntitutes this Court's conclusions of law under Fed.R.Civ.P. 52(a).

The Right of Privacy

The "right of privacy" protects certain fundamental personal liberties from undue interference by government. *Carey v. Population Services*, 431 U.S. 678, 97 S.Ct. 2010, 52 L.Ed.2d 675 (1977); *Roe v. Wade*, 410 U.S. 113, 93 S.Ct.

[29] *See* Appendix A. Bestiality is prohibited only if it occurs in public; thus, under the Texas Penal Code, one may engage in private sexual acts with "an animal or fowl," § 21.07 (Public Lewdness)—but may not engage in private oral or anal sex with a consenting adult of the same sex, § 21.06 (Homosexual Conduct). And for seven years after 1974, a 17-year-old boy could have been prosecuted as a felon "for fondling a 16 year-old girl at her invitation in private, but not for engaging in sexual intercourse with her"--because it is a defense to statutory rape if the defendant is "not more than two years older than the victim," § 21.10, but there was no such defense to "indecency with a child," § 21.11, until this section was amended in 1981. Tex.Penal Code Ann. § 21-11 (Practice Commentary).

[30] As discussed in Appendix A, it has been suggested that members of the Texas House of Representatives "decided to support § 21.06, as proposed, fearing a backlash against the entire Penal Code [revision] should [private homosexual conduct] be decriminalized." Similarly, in *New York v. Onofre*, 51 N.Y.2d 476, 434 N.Y.S.2d 947, 415 N.E.2d 936 (1980), *cert. denied*, 451 U.S. 987, 101 S.Ct. 2323, 68 L.Ed.2d 845 (1981), the court emphasized "the statement contained in the memorandum prepared by the chairman of the Temporary Commission: 'It would appear that the Legislature's decision to restore the consensual sodomy offense was, as with adultery, based largely upon the premises that *deletion thereof might ostensibly be construed as legislative approval of deviate conduct.*'" (434 N.Y.S.2d at 951-52, 415 N.E.2d at 941) (emphasis added).

705, 35 L.Ed.2d 147 (1973); *Eisenstadt v. Baird*, 405 U.S. 438, 92 S.Ct. 1029, 31 L.Ed.2d 349 (1972); *Stanley v. Georgia*, 394 U.S. 557, 89 S.Ct. 1243, 22 L.Ed.2d 542 (1969); *Griswold v. Connecticut*, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965). Although Supreme Court opinions have found various constitutional provisions to be the source of this right of privacy[31]—the first amendment's freedoms of association and of speech; the due process and equal protection clauses of the fourteenth amendment; the fourth and ninth amendments; the "penumbras" of specific guarantees of the Bill of Rights—its existence is now "an established part of our constitutional jurisprudence." *Dike v. School Board*, 650 F.2d 783 (5th Cir. 1981).

It is clear that the right of privacy protects individual decisions concerning marriage,[32] procreation,[33] contraception,[34]

[31] "*See, e.g., Griswold v. Connecticut*, 381 U.S. at 484-85, 85 S.Ct. at 1681-82, 14 L.Ed.2d at 514-15 (Douglas, J.) (right of privacy found in 'penumbras' of specific guarantees of the Bill of Rights); *id.* at 486, 492, 85 S.Ct. at 1686, 14 L.Ed.2d at 516, 519 (Goldberg, J., joined by Warren, C.J., and Brennan, J.) (fundamental personal rights are protected by the concept of liberty in the Fourteenth Amendment's due process clause; Ninth Amendment shows framers' belief that fundamental rights exist that are not enumerated in the Bill of Rights); *id.* at 500, 85 S.Ct. at 1690, 14 L.Ed.2d at 524 (Harland, J., concurring) (Fourteenth Amendment's due process clause protects, of its own force, certain basic values); *Carey v. Population Services*, 431 U.S. at 684, 97 S.Ct. at 2015, 52 L.Ed.2d at 684 (due process clause protects liberty interests in zones of personal privacy); *Roe v. Wade*, 410 U.S. at 153, 93 S.Ct. at 726, 35 L.Ed.2d at 177 (right of privacy founded in Fourteenth Amendment's concept of personal liberty and restrictions upon state action); . . ." *Dike v. School Board*, 650 F.2d at 786, note 1.

[32] *See Zablocki v. Redhail*, 434 U.S. 374, 98 S.Ct. 673, 54 L.Ed.2d 618 (1978); *Loving v. Virginia*, 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967).

[33] *See Cleveland Board of Education v. LaFleur*, 414 U.S. 632, 94 S.Ct. 791, 39 L.Ed.2d 52 (1974); *Skinner v. Oklahoma*, 316 U.S. 535, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942).

[34] *See Griswold v. Connecticut*, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965); *Eisenstadt v. Baird*, 405 U.S. 438, 92 S.Ct. 1029, 31 L.Ed.2d 349 (1972); *Carey v. Population Services*, 431 U.S. 678, 97 S.Ct. 2010, 52 L.Ed 2d 675 (1977).

abortion,[35] and family relationships[36] — and that any government regulation upon such fundamental rights "may be justified only by a compelling state interest and must be narrowly drawn to express only the legitimate state interests at stake." *Dike v. School Board*, 650 F.2d at 786-87. However, the "outer limits" of the right of privacy have not been established. *Carey v. Population Services*, 431 U.S. at 684, 97 S.Ct. at 2015. Development of this area of the law has proceeded on almost a case-by-case basis,[37] and there are still other fundamental personal liberties — besides those involved in past Supreme Court decisions — that are protected by the right of privacy.[38]

Does the right of privacy extend to private sexual behavior between consenting adults? In particular: Can a husband and wife be subjected to criminal prosecution for engaging in oral

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[35] *See Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973); *Bellotti v. Baird*, 443 U.S. 622, 99 S.Ct. 3035, 61 L.Ed.2d 797 (1979).

[36] *See Moore v. City of East Cleveland*, 431 U.S. 494, 97 S.Ct. 1932, 52 L.Ed.2d 531 (1977).

[37] In *Griswold v. Connecticut*, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965), the right of privacy was officially recognized, but the opinion (by Justice Douglas) was unclear whether the prohibition on state regulation of a married couple's access to the use of contraceptives was limited to the marital relationship, or whether it was the intimacy and choice of individuals, themselves, that was protected. Then, *Eisenstadt v. Baird*, 405 U.S. 438, 92 S.Ct. 1029, 31 L.Ed.2d 349 (1972), and *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973), which guaranteed birth control devices and abortions for unmarried persons, held that the privacy protected is "the right of the individual, married or single." And, *Planned Parenthood v. Danforth*, 428 U.S. 52, 96 S.Ct. 2831, 49 L.Ed.2d 788 (1976), and *Carey v. Population Services*, 431 U.S. 678, 97 S.Ct. 2010, 52 L.Ed.2d 675 (1977), continued the principle that individual decisions were protected, and that the right of privacy was not limited to the marital relationship. The cases cannot be limited to their particular fact situations since "the outer limits of this aspect of privacy have not been marked by the Court" (431 U.S. at 684, 97 S.Ct. at 2015).

[38] *See, e.g., Stanley v. Georgia*, 394 U.S. at 564, 89 S.Ct. at 1247 (possession of pornographic printed or filmed matter in the privacy of one's own home); *Dike v. School Board*, 650 F.2d at 787 (right of school teacher to breastfeed her child during duty free lunch periods).

or anal sex in the privacy of their own home? Can a state law constitutionally prohibit unmarried males and females from engaging in oral or anal sodomy or, indeed, *any* extramarital sexual relations? Can a homosexual be prosecuted for sexual conduct with another adult homosexual, consensually and in private?

The Supreme Court has not answered these questions in any opinion. Indeed, it has refused to do so on several occasions, including these three cases: *Buchanan v. Batchelor*, 308 F.Supp. 729 (N.D. Tex. 1970), rev'd on other grounds sub nom, *Wade v. Buchanan*, 401 U.S. 989, 91 S.Ct. 1222, 28 L.Ed.2d 526 (1971); *Doe v. Commonwealth's Attorney*, 403 F.Supp. 1199 (E.D. Va. 1975), summary affirmance without opinion, 425 U.S. 901, 96 S.Ct. 1489, 47 L.Ed.2d 751 (1976); and *New York v. Onofre*, 51 N.Y.2d 476, 434 N.Y.S.2d 947, 415 N.E.2d 936 (N.Y. 1980), cert. denied, 451 U.S. 987, 101 S.Ct. 2323, 68 L.Ed.2d 845 (1981).[39]

Buchanan v. Batchelor

In *Buchanan v. Batchelor*, 308 F.Supp. 729 (N.D. Tex. 1970), a three-judge panel (Goldberg, Circuit Judge; Hughes and Taylor, District Judges) held that the Texas sodomy statute (Article 524) — which then prohibited *all* oral and anal sex, whether by heterosexuals or homosexuals — was unconstitutional because it violated the right of privacy of married couples by subjecting them to felony prosecution for private acts of

[39] Other instances include *Lovisi v. Slayton*, 539 F.2d 349 (4th Cir. 1975) (en banc), *cert. denied*, 429 U.S. 977, 97 S.Ct. 485, 50 L.Ed.2d 585 (1976); *Canfield v. Oklahoma*, 506 P.2d 987 (Okla. Cr. App. 1973), dism'd for want of substantial federal question, 414 U.S. 991, 94 S.Ct. 342, 38 L.Ed.2d 230 (1973); *Pruett v. Texas*, 463 S.W.2d 191 (1971), dism'd for want of substantial federal question, 402 U.S. 902, 91 S.Ct. 1379, 28 L.Ed.2d 643 (1971).

sodomy, "an intimate relation of husband and wife." The court stated:

> "Sodomy is not an act which has the approval of the majority of the people. In fact such conduct is probably offensive to the vast majority, but such opinion is not sufficient reason for the State to encroach upon the liberty of married persons in their private conduct. Absent some demonstrable necessity, matters of (good or bad) taste are to be protected from regulation. . . ." (308 F.Supp. at 733).

The court permanently enjoined the defendant Wade from enforcing Article 524, which "was declared void on its face for unconstitutional overbreadth." However, this decision was prior to *Eisenstadt*, and the court indicated that the right of privacy did not extend to private or public homosexual conduct because neither involved "private acts of the marital relation" (308 F.Supp. at 736).

On appeal, the Supreme Court did not reach the merits, 401 U.S. 989, 91 S.Ct. 1222, 28 L.Ed.2d 526 (1971), but remanded the case for consideration as to whether abstention was proper in light of its then-recent decision in *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971).[40] However, the three judge panel had specifically noted that "there have been no prosecutions under the Act of married persons for private acts of sodomy"; that it was unclear from

[40] Federal courts must not enjoin pending state criminal prosecutions except under extraordinary circumstances — such as a "great and immediate" threat to the plaintiff's constitutional rights that cannot be eliminated by his defense against a single prosecution (401 U.S. at 45-47, 91 S.Ct. at 751-752), or bad faith and harassment through repeated prosecutions or threats of prosecution (401 U.S. at 47-50, 91 S.Ct. at 752-753). *Dombrowski v. Pfister*, 380 U.S. 479, 85 S.Ct. 1116, 14 L.Ed.2d 22 (1965).

the record "whether there have been prosecutions of homosexuals for private acts of sodomy"; that no changes were pending against the intervenors, a married couple (the Gibsons) and a homosexual male (Strickland); but that the homosexual plaintiff, Buchanan, "had twice been arrested and charged" with acts of sodomy with another male in public restrooms (308 F.Supp. at 730-31).

Therefore, even if a *Younger* abstention problem was presented in *Buchanan* by the homosexual plaintiff, who sought an injunction against two pending state prosecutions for public offenses — none was presented by either of the intervenors, the married couple (who had prevailed in their right of privacy claim) and the homosexual Strickland (who had not prevailed in his).

Doe v. Commonwealth's Attorney

Next, in *Doe v. Commonwealth's Attorney*, 403 F.Supp. 1199 (E.D. Va. 1975), a three-judge panel upheld the constitutionality of a Virginia criminal statute which prohibited oral or anal sodomy by married couples, by unmarried males and females, and by homosexuals. The majority opinion rejected the contention that the right of privacy extends to private homosexual conduct between consenting adults. However, Judge Merhige's dissenting opinion concluded that, under a proper analysis of the Supreme Court decisions, the right of privacy does protect *all* private consensual sexual conduct between adults, whether heterosexual or homosexual:

> ". . . I view those cases [*Roe v. Wade*, *Griswold v. Connecticut*] as standing for the principle that every individual has a right to be free from unwarranted governmental intrusion into one's decisions on private matters of

> intimate concern. A mature individual's choice of an adult sexual partner, in the privacy of his or her own home, would appear to me to be a decision of the utmost private and intimate concern. Private consensual sex acts between adults are matters, absent evidence that they are harmful, in which the state has no legitimate interest.
>
> ". . .
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> "*Griswold, supra*, in its context, applied the right of privacy in sexual matters to the marital relationship. *Eisenstadt, supra*, however, clearly demonstrates that the right to privacy in sexual relationships is not limited to the marital relationship. Both *Roe, supra*, and *Eisenstadt, supra*, cogently demonstrate that intimate personal decisions or private matters of substantial importance to the well-being of the individuals involved are protected by the Due Process Clause. The right to select consenting adult sexual partners must be considered within this category. The exercise of that right, whether heterosexual or homosexual, should not be proscribed by state regulation absent compelling justification." (403 F.Supp. at 1203-04) (Merhige, dissenting).

The Supreme Court, without writing an opinion, summarily affirmed the majority decision in *Commonwealth's Attorney*, 425 U.S. 901, 96 S.Ct. 1489, 47 L.Ed.2d 751 (1976).[41]

However, this summary affirmance *does not* resolve the issues presented in this case. A summary affirmance is "not of the same precedential value as would be an opinion of the [Supreme] Court treating the same question on the merits." *Edelman v. Jordan*, 415 U.S. 651, 671, 94 S.Ct. 1347, 1359, 39 L.Ed.2d 662 (1974); *Hicks v. Miranda*, 422 U.S. 332, 95

[41] Justices Brennan, Marshall, and Stevens would have noted probable jurisdiction and set the case for oral argument. 425 U.S. at 901, 96 S.Ct. at 1489.

S.Ct. 2281, 45 L.Ed.2d 223 (1975).[42] A summary affirmance does not prevent "lower courts from coming to opposite conclusions except on "the precise issues presented and necessarily determined by those actions." *Illinois State Board v. Socialist Workers Party*, 440 U.S. 173, 99 S.Ct. 983, 59 L.Ed.2d 230 (1979); *Mandel v. Bradley*, 432 U.S. 173, 176, 97 S.Ct. 2238, 2240, 53 L.Ed.2d 199 (1977). Nor does it bind a lower court when "doctrinal developments" cast substantial doubt upon the summary affirmance. As summarized in *Lecates v. Justice of the Peace*, 637 F.2d 898 (3rd Cir. 1980):

> ". . . In short, under *Mandel* and *Illinois State Board*, the precedential value of a summary disposition by the Supreme Court is to be confined to the exact facts of the case and to the precise question posed on the jurisdictional statement. Furthermore, indications that there have been doctrinal developments since the summary action will relieve a lower court from the duty to adhere to a summary disposition" (637 F.2d at 904).

Both factors are present here. The jurisdictional statement in *Commonwealth's Attorney* did present the same "right of privacy" issue as this case,[43] but — since the Virginia statute

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[42] As explained in *Fusari v. Steinberg*, 419 U.S. 379, 95 S.Ct. 533, 42 L.Ed.2d 521 (1975):

> "When we summarily affirm without an opinion . . . we affirm the judgment but not necessarily the reasoning by which it was reached. An unexplicated summary affirmance settles the issues *for the parties*, and is not to be read as a renunciation by this Court of doctrine previously announced in our opinions after full argument" (419 U.S. at 391-92, 95 S.Ct. at 540-41).

[43] The question presented in the *Commonwealth's Attorney* Jurisdictional Statement was this:

> "Whether Virginia Code § 18.1-212, as applied to sexual activity between consenting adults in private, violates appellants' constitutional

proscribed all sodomy, both heterosexual and homosexual — it did not present the "equal protection" claim involved in this case (that § 21.06 invidiously discriminates against homosexuals by prohibiting sodomy by them, but not by heterosexuals).[44] Moreover, even as to the right of privacy issue, two "doctrinal developments" have indicated that little, if any, weight should be given to the summary affirmance in *Commonwealth's Attorney*: (i) the decision in *Carey v. Population Services*, 431 U.S. 678, 97 S.Ct. 2010, 52 L.Ed.2d 675 (1977); and (ii) the denial of certiorari in *New York v. Onofre*, 51 N.Y.2d 476, 434 N.Y.S.2d 947, 415 N.E.2d 936 (1980), cert. denied, 451 U.S. 987, 101 S.Ct. 2323, 68 L.Ed.2d 845 (1981).

In *Carey v. Population Services*, decided less than 15 months after the summary affirmance in *Commonwealth's Attorney*, the Supreme Court stated that:

> ". . . the Court has not definitively answered the difficult question whether and to what extent the Constitution prohibits state statutes regulating [private consensual sexual] behavior among adults, . . . and we do not purport to answer that question now" (431 U.S. 688 at n.5, 97 S.Ct. 2018 at n.5; 431 U.S. 694, n.17, 97 S.Ct. 2021, n.17).

Carey was a plurality decision. However, Justice Brennan made this comment twice in the opinion — first in footnote 5

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rights to privacy, to due process of law, and to the equal protection of the laws, under the First, Fourth, Fifth, Ninth and Fourteenth Amendments to the Constitution."

[44] Under the Virginia sodomy statute, homosexuals were not treated differently than married or unmarried heterosexuals. Although the question presented in *Commonwealth's Attorney* refers to "equal protection," the Jurisdictional Statement makes it clear that this merely referred to one of the several constitutional sources of the "right of privacy" (see note 31), and that no separate equal protection claim was involved.

of Part III (431 U.S. at 688, 97 S.Ct. at 2018), which was joined by six Justices (Brennan, Stewart, Marshall, Blackmun, Stevens and White); second in footnote 17 of Part IV (431 U.S. at 694, 97 S.Ct. at 2021), which was joined by four Justices (Brennan, Stewart, Marshall, and Blackmun).[45] Thus, six Justices in *Carey* agreed that the summary affirmance in *Commonwealth's Attorney* did not definitively answer the difficult question of whether the right of privacy extends to private sexual conduct between consenting adults.[46]

New York v. Onofre

Finally, the Supreme Court denied certiorari in a case which — contrary to *Commonwealth's Attorney* — held that the right of privacy did extend to private sexual conduct between adults: *New York v. Onofre*, 434 N.Y.S.2d 947, 415 N.E.2d 936

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[45] Justice White's concurring opinion stated that he did not regard Part III of the majority opinion "as declaring unconstitutional any state law forbidding sexual relations" (431 U.S. at 702, 97 S.Ct. at 2025).

[46] This conclusion is supported by the dissent of Justice Rehnquist in *Carey*. He disagreed, and could not "let pass without comment," the statements in footnotes 5 and 17:

> "While we have not ruled on every conceivable regulation affecting such conduct the facial constitutional validity of criminal statutes prohibiting certain consensual acts has been 'definitively' established. *Doe v. Commonwealth's Attorney*, 425 U.S. 901 [96 S.Ct. 1489, 47 L.Ed.2d 751] (1976). *See Hicks v. Miranda*, 422 U.S. 332, 343-344 [95 S.Ct. 2281, 2288-2289, 45 L.Ed.2d 223] (1975)." (431 U.S. 718 at n.2, 97 S.Ct. 2033 at n.2).

No one joined the Rehnquist dissent — and, despite his comments, six Justices agreed that the Court "has not definitively answered the difficult question whether and to what extent the Constitution prohibits state statutes regulating such [private consensual sexual] behavior among adults" (431 U.S. 688 at n.5, 97 S.Ct. 2018 at n.5).

(N.Y. 1980), *cert. denied*, 451 U.S. 987, 101 S.Ct. 2323, 68 L.Ed.2d 845 (1981).

The New York sodomy statute prohibited oral and anal sex between homosexuals and between unmarried males and females; it did not condemn sodomy between persons who were married to each other. After reviewing the Supreme Court decisions, the New York Court of Appeals held that the right of privacy does extend to private sexual conduct between consenting adults and that the statute violated this right of the defendants[47] (as well as their rights of equal protection):

> ". . . Because the statutes are broad enough to reach noncommercial, cloistered personal sexual conduct of consenting adults and because it permits the same conduct between persons married to each other without sanction, we agree with defendants' contentions that it violates both their right of privacy and the right to equal protection of the laws guaranteed them by the United States Constitution.
>
> ". . .
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> "In light of these decisions,[48] protecting under the cloak of the right of privacy individual decisions as to indulgence in acts of sexual intimacy by unmarried persons and as to satisfaction of sexual desires by resort to material condemned as obscene by community standards when

[47] In *Onofre*, three cases were consolidated for decision. One involved anal sodomy between two consenting homosexual males at the defendant's home (*Onofre*); one involved oral sodomy between two males in an automobile (*People v. Goss*); and one involved oral sodomy between a female (*Sweat*) and a male in an automobile. Neither of the two incidents occurring in cars took place "in public." (434 N.Y.S.2d at 948, 949 n.2, 415 N.E.2d at 937, 938 n.2).

[48] *Eisenstadt v. Baird*, 405 U.S. 438, 92 S.Ct. 1029, 31 L.Ed.2d 349; *Carey v. Population Services*, 431 U.S. 678, 97 S.Ct. 2010, 52 L.Ed.2d 675; *Stanley v. Georgia*, 394 U.S. 557, 89 S.Ct. 1243, 22 L.Ed.2d 542.

> done in a cloistered setting, no rational basis appears for excluding from the same protection decisions — such as those made by defendants before us — to seek sexual gratification from what at least once was commonly regarded as 'deviant' conduct, so long as the decisions are voluntarily made by adults in a noncommercial, private setting." (434 N.Y.S.2d at 949, 951, 415 N.E.2d at 938, 940).

The Supreme Court's denial of certiorari in *Onofre*, 451 U.S. 987, 101 S.Ct. 2323, 68 L.Ed.2d 845 is of no precedential value; it does not constitute a decision on the merits of the constitutional questions. *Rosenberg v. United States*, 344 U.S. 889, 73 S.Ct. 134, 97 L.Ed. 687 (1952); *Brown v. Allen*, 344 U.S. 443, 492, 73 S.Ct. 397, 439, 97 L.Ed. 469 (1953).

However, the lower court decisions in *Onofre* and *Commonwealth's Attorney* are inconsistent: *the constitutional right of privacy extends to private sexual conduct between consenting adults in New York, but it does not in Virginia.*[49] And, there is no Supreme Court opinion that determines which approach is constitutionally correct — and which answers "the difficult question whether and to what extent the Constitution prohibits state statutes regulating [private consensual sexual] behavior among adults." *Carey v. Population Services*, 431 U.S. at 688 n.5, 97 S.Ct. at 2018 n.5.

Therefore, despite the summary affirmance in *Commonwealth's Attorney*, the question of whether the Constitution permits the use of a state statute (such as § 21.06) to prohibit

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[49] Possibly the Supreme Court's actions can be resolved by the fact that *Onofre* involved an equal protection claim, while *Commonwealth's Attorney* did not (see note 44). If so, this would confirm this Court's decision that § 21.06 violates the plaintiff's right to equal protection because it discriminates against homosexuals by prohibiting sodomy by them, but not by heterosexuals.

private consensual homosexual conduct is a proper one for consideration by this Court.[50]

private homosexual conduct is protected

This Court agrees with the analysis of the right of privacy by the dissenting opinion of Judge Merhige in *Doe v. Commonwealth's Attorney*, 403 F.Supp. 1199, and by the majority opinion in *New York v. Onofre*, 51 N.Y.2d 476, 434 N.Y.S.2d 947, 415 N.E.2d 936.

Every individual has the right to be free from undue interference by the state in important and intimate personal matters. Decisions concerning a person's sexual needs or desires are "in a field that by definition concerns the most intimate of human activities and relationships." *Carey*, 431 U.S. at 685, 97 S.Ct. at 2016. The right of two individuals to choose what type of sexual conduct they will enjoy in private is just as personal, just as important, just as sensitive — indeed, even more so — than the decision by the same couple to engage in sex using a contraceptive to prevent unwanted pregnancy. *Carey*, 431 U.S. at 685, 687, 97 S.Ct. at 2016, 2017. "If the right of privacy means anything, it is the right of the *individual*, married or single, to be free of unwarranted government intrusion into matters fundamentally affecting a person" as the decision to engage in private sexual conduct with another consenting adult. *Eisenstadt*, 405 U.S. at 453, 92 S.Ct. at 1038.

This is true whether it is a husband and wife choosing to engage in oral or anal sex in the privacy of their bedroom — or whether it is an unmarried male and female privately engag-

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[50] The same conclusion was reached in *New York v. Onofre*, 434 N.Y.S.2d at 954, 415 N.E.2d at 943. However, Judge Porter reached a different conclusion in *Childers v. Dallas Police Dept.*, 513 F.Supp. 134 (N.D. Tex. 1981), *aff'd without opinion*, 669 F.2d 732 (5th Cir. 1982). See the discussion of *Childers* in Appendix A.

ing in extramarital sexual relations of their own choice.[51] And, it is equally true as to a homosexual choosing to engage in sodomy in private with a consenting adult of the same sex.[52] The right of privacy, therefore, does extend to private sexual conduct between consenting adults (whether heterosexual or homosexual) — and any regulation of this fundamental right must be justified by a compelling state interest.

The right of privacy is not, as defendants contend, "limited to only two aspects of sexual behavior" — marital intimacy (by virtue of *Griswold v. Connecticut*) and procreative choice (by reason of *Eisenstadt v. Baird*). Indeed, *Eisenstadt* makes it clear that the right of privacy in sexual matters is not limited to married couples:

> "If under *Griswold* the distribution of contraceptives to married persons cannot be prohibited, a ban on distribution to unmarried persons would be equally impermissible. It is true that in *Griswold* the right of privacy in question inhered in the marital relationship. Yet the marriage couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally

[51] Although these issues are not directly presented in this case, it seems obvious that the right of privacy would not extend to private homosexual conduct if it did not extend to private heterosexual conduct.

[52] From the testimony of the plaintiff, Donald F. Baker, about his life — the reluctant, painful recognition of his homosexuality; his disgust and self-loathing and fear; his isolation and suffering; and the eventual reconciliation of his "exclusive homosexuality" with his devout religious beliefs and family values — it is evident that Baker's resulting decisions concerning his sexual needs and desires are of the most personal, intimate and important concern (just as they are for heterosexuals).

> affecting a person as the decision whether to bear or beget a child. *See Stanley v. Georgia*, 394 U.S. 557 [89 S.Ct. 1243, 22 L.Ed.2d 542] (1969). . . ." (405 U.S. at 453, 92 S.Ct. at 1038).

Moreover, in *Stanley v. Georgia*, 394 U.S. 557, 89 S.Ct. 1243, 22 L.Ed.2d 542 (1969), the right of privacy involved neither "marital intimacy" or "procreative choice." There, the defendant possessed films and printed material which were pornographic. As discussed in *New York v. Onofre*:

> ". . . In *Stanley* the court found violative of the individual's right to be free from governmental interference in making important, protected decisions a statute which made criminal the possession of obscene matter within the privacy of the defendant's home. Although the material itself was entitled to no protection against government proscription (*Roth v. United States*, 354 U.S. 476 [77 S.Ct. 1304, 1 L.Ed.2d 1498]), the defendant's choice to seek sexual gratification by viewing it and the effectuation of that choice within the bastion of his home, removed from the public eye, was held to be blanketed by the constitutional right of privacy." (434 N.Y.S.2d at 950, 415 N.E.2d at 939).

See *Doe v. Commonwealth's Attorney*, 403 F.Supp. at 1204-05 (Merhige, J., dissenting).

Under the *Stanley* and *Eisenstadt* extensions of the right of privacy,[53] the plaintiff could possess and enjoy in *private* porno-

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[53] Contrary to defendants' arguments, *Stanley v. Georgia* was *not* based solely upon a first amendment right to receive information. As the Court stated:

> ". . . Moreover, in the context of this case — a prosecution for mere possession of printed or filmed matter in the privacy of a person's own

graphic material — movies, videotapes, magazines, books, etc. — which graphically depicts sexual activities by homosexuals. It seems ludicrous to attempt to draw some constitutional distinction, as defendants do, between his right to "seek sexual gratification by viewing" such obscene material, and his right to seek sexual gratification with a consenting adult partner in private.

The right of privacy does extend to private, voluntary, intimate relationships — between husband and wife, between unmarried males and females, between homosexuals.[54] Ac-

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home — that right takes on an added dimension. *For also fundamental is the right to be free, except in very limited circumstances, from unwanted government intrusions into one's privacy.*" (394 U.S. at 564, 89 S.Ct. at 1247).

However, there is no right of privacy "to watch obscene movies in places of public accommodation." *Paris Adult Theater I v. Slaton*, 413 U.S. 49, 67, 93 S.Ct. 2628, 2640, 37 L.Ed.2d 446 (1973).

[54] Other courts have reached the same conclusion, extending the right of privacy to private sexual conduct between consenting adults. *See State v. Saunders*, 75 N.J. 200, 381 A.2d 333 (1977); *State v. Pilcher*, 242 N.W.2d 348 (Iowa 1976). *Cf. Nemetz v. Immigration & Naturalization Service*, 647 F.2d 432 (4th Cir. 1981); *Lesbian Gay Freedom Day Committee, Inc. v. Immigration & Naturalization Service*, 541 F.Supp. 569 (N.D. Cal. 1982); *Gay Law Students Ass'n v. Pacific Tel. & Tel. Co.*, 24 Cal.3d 458, 156 Cal. Rptr. 14, 595 P.2d 592 (1979); *Commonwealth v. Bonadio*, 490 Pa. 91, 415 A.2d 47 (1980) (sodomy statute declared constitutionally infirm on equal protection grounds, privacy issue not reached). *See also Doe v. Commonwealth's Attorney*, 403 F.Supp. 1205 n.3 (Merhige, J., dissenting).

But some other courts have refused to do so, although some of these involve the use of force or offenses with minors. *See Lovisi v. Slayton*, 539 F.2d 349 (4th Cir. 1975) (en banc), *cert. denied*, 429 U.S. 977, 97 S.Ct. 485, 50 L.Ed.2d 585 (1976); *Wilson v. Swing*, 463 F.Supp. 555 (M.D.N.C. 1978); *State v. Santos*, 413 A.2d 58 (R.I. 1980); *Neville v. State*, 290 Md. 364, 430 A.2d 570 (1981); *State v. Elliott*, 89 N.M. 305, 551 P.2d 1352 (1976), *later appeal, State v. Elliott*, 89 N.M. 756, 557 P.2d 1105 (1977) (enforcing earlier opinion); *State v. McCoy*, 337 So.2d 192 (La. 1976).

And, at least one court has recognized "that there is substantial academic comment which argues that the choice to engage in homosexual action is a

cordingly, homosexual conduct in private between consenting adults is protected by a fundamental right of privacy. Any state restriction upon that right must be justified by some compelling state interest.

no state interest

The right of privacy is not absolute. But any regulation of this fundamental right "may be justified only by a compelling state interest and must be narrowly drawn to express only the legitimate state interests at stake." *Dike v. School Board*, 650 F.2d at 787.

Obviously, the state has a compelling interest in regulating some types of sexual conduct — rape, indecent acts in public, sex offenses involving minors, etc. *New York v. Onofre*, 434 N.Y.S.2d at 952, 415 N.E.2d at 941; *Doe v. Commonwealth's Attorney*, 403 F.Supp. at 1204 (Merhige, J., dissenting). But does the state have any interest in regulating private sexual conduct between consenting adults — or in criminally prosecuting homosexuals for private, consensual sodomy?

Basically, the defendants claim that the state's interests justifying the ban on homosexual conduct by § 21.06 are (i) morality and decency, (ii) public health, (iii) welfare and safety, and (iv) procreation.[55] However, the evidence presented

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personal decision entitled, at least in some instances, to full protection as an aspect of the individual's right of privacy." *Beller v. Middendorf*, 632 F.2d 788, 809 (9th Cir. 1980). See L. Tribe, American Constitutional Law § 15-13 (1978 and Supp. 1979); Gerety, *Redefining Privacy*, 12 Harv.C.R.-C.L.L. Rev. 233, 280-81 (1977); Wilkinson & White, *Constitutional Protection for Personal Lifestyle*, 62 Cornell L.Rev. 563 (1977).

[55] Somewhat different justifications were offered at various times by each defendant:

> *Dallas County* (through District Attorney Wade) claimed the "traditional police powers to provide for the security, welfare, safety, morals,

at trial *did not* support any of these claims. Instead, it established that the state has no "compelling interest" to justify § 21.06 — and that, indeed, this statute is not even "rationally related" to any "legitimate state interest." *Silva v. Vowell*, 621 F.2d 640, 647 (5th Cir. 1980).

The defendants did not produce a single witness, or any other evidence, to support the alleged state interests of "morality and decency, welfare and safety, and procreation." They did present one witness who testified about the state's supposed interest in "public health" furthered by § 21.06. This was Dr. James Grigson — who was not an expert in the field of homosexuality but who testified that criminal sanctions against homosexual conduct would promote the health of (i) children, by fostering their growth and development, and (ii) homosexuals, by forcing them to seek psychiatric treatment and be "cured." These opinions are not based upon any independent

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decency *and other interests*" (motion for summary judgment, p. 30) . . . the "safety, health, decency, morals, general welfare *and to promote order in society*" (motion for summary judgment, p. 26) . . . the "decency, welfare of society, procreation, morals, and *other self-evident state interests*" (Amd. Response to Request for Admissions, ¶ 4) . . . the protection of "those within [the state's] borders by proscribing homosexual conduct" (post-trial brief, p. 21) . . . the reinforcement "of normal growth and behavioral patterns" and the inducement to "those homosexuals who now seek help to overcome their tendencies" (post-trial brief, p. 21).

The *City of Dallas* (through City Attorney Holt) claimed "the preservation of morality, the maintaining of a decent society, the promotion of mental health" (proposed findings 6-8) . . . the "continued procreation of society and protection of morals" (Amd. Response to Request for Admissions, ¶ 4) . . . "upholding morality and decency" (post-trial brief, p. 5) . . . the "health, welfare and morals of individuals and of society" (pretrial order, p. 3) . . . the "positive effect upon the ability of children to form a 'positive gender identification' and to reinforce societal norms of acceptable sexual behavior" (post-trial brief, pp. 5-8).

The *State of Texas* (through its Attorney General) claimed only procreation: "Should homosexual conduct become too widespread, society would lose its means of reproducing itself" (Response of The State of Texas, p. 3).

research; they are contrary to the medical and psychiatric literature, to the opinions of most American psychiatrists today, and to the very credible evidence given by plaintiff's experts. For these, and the other reasons discussed above, this Court completely discounts Dr. Grigson's testimony and opinions.

In addition to the lack of any expert testimony supporting the claimed state interests, both District Attorney Wade and City Attorney Holt were unable to explain how § 21.06 furthered the supposed interests of morality or decency, the welfare of society, procreation, or any other interest. Nor was there any evidence that the Texas legislature had even considered these alleged interests when it passed § 21.06 as part of the general revision of the Penal Code in 1974. Therefore, *under the record in this case, the defendants have nothing to rely upon but the assertion of general platitudes* (morality, decency, etc.). This is totally inadequate to justify § 21.06, as shown by *Commonwealth's Attorney*:

> "The defendants, represented by the highest legal officer of the state, made no tender of any evidence which even impliedly demonstrated that homosexuality causes society and significant harm. No effort was made by the defendants to establish either a rational basis or a compelling state interest so as to justify the proscription of § 8.1-212 of the Code of Virginia, presently under attack.
>
> ". . .
>
> "On the basis of this record one can only conclude that the sole basis of the proscription of homosexuality was what the majority refers to as the promotion of morality and decency. As salutary a legislative goal as this may be, I can find no authority for intrusion by the state into the private dwelling of a citizen. *Stanley v. Georgia*, 394 U.S. 557 [89 S.Ct. 1243, 22 L.Ed.2d 542] . . . The Supreme Court has made it clear that fundamental rights

> of such an intimate facet of an individual's life as sex, absent circumstances warranting intrusion by the state, are to be respected. My brothers, I respectfully suggest, have by today's ruling misinterpreted the issue — the issue centers not around morality or decency, but the constitutional right of privacy." (403 F.Supp. at 1205) (Merhige, J., dissenting).

Moreover, the plaintiff's evidence establishes that there is no compelling state interest served by § 21.06 — and that, indeed, this statute's condemnation of homosexual conduct is not even rationally related to a legitimate state interest. In particular, this evidence (including the testimony of the experts, Dr. Marmor and Dr. Simon) established the following:

> Homosexuals are not ill or mentally diseased. They are not criminals. They have no propensity for crimes, those involving sexual offenses or otherwise, any more than heterosexuals. But over 700,000 individuals are "criminals" in Texas today because of § 21.06.
>
> Homosexuality is not a matter of choice. It is fixed at a very early age. Only a small percentage of homosexuals can be changed or "cured" by psychiatric treatment. The numbers of homosexuals in society are not reduced by criminal laws like § 21.06, nor would they be increased if such laws did not exist.
>
> Homosexuality is not communicable. The absence of § 21.06 would not lead to increased crime or violence or other threats to public health or safety. This statute does not further the "growth and development" of children and it harms, rather than helps, the mental health of homosexuals. There is simply no rational connection between the acts proscribed by § 21.06 and the claimed interests of morality, decency, health, welfare, safety and procreation.

Therefore, § 21.06 is not justified by any "compelling state interest." Moreover, its prohibition against private homosexual conduct between consenting adults is not even rationally related to any legitimate state interest. Accordingly, § 21.06 is unconstitutional because it violates the plaintiff's fundamental right of privacy.[56]

Equal Protection

Section 21.06 does not prohibit sodomy between consenting adults of the opposite sex; only oral or anal sex between consenting adults of the same sex is illegal. Thus, *on its face*, § 21.06 discriminates against homosexuals by making acts criminal when committed by them, but not by heterosexuals. This violates the plaintiff's right to equal protection of the law unless the discrimination between heterosexuals and homosexuals bears "some rational relationship to legitimate state purposes." *San Antonio School District v. Rodriquez*, 411 U.S. 1, 40, 93 S.Ct. 1278, 1300, 36 L.Ed.2d 16 (1973); *Silva v. Vowell*, 621 F.2d 640, 647 (5th Cir. 1980).

As discussed in the preceding section, the evidence in this case established that none of the interests claimed by defendants (morality and decency, public health, welfare and safety, and procreation) were furthered by § 21.06 — and that this statute is not "rationally related" to any "legitimate state interest." Indeed, the defendant Wade conceded this; he testified that he knew of no rational basis for the discrimination in § 21.06 between homosexual sodomy and heterosexual sodomy:

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[56] The defendant Wade's argument that the plaintiff "waived" or "abandoned" his right of privacy is absurd. The fact that the plaintiff was the subject of an interview in a magazine article (Texas Monthly, p. 180; defendant Wade's exh. 1) is certainly not a consent to "unwarranted governmental intrusion" into his personal and intimate decisions concerning private sexual conduct.

"Q. Doesn't the statute, § 21.06, doesn't it permit private sodomy by heterosexuals but not homosexuals?

"A. I wouldn't even know that, but I'm taking your word for it.

"Q. Assume it does.

"A. Yeah.

"Q. What rational basis is there for that classification, if you known of any?

"A. I don't know of any."

Therefore, § 21.06 is invalid because it violates the plaintiff's right to equal protection. *New York v. Onofre*, 51 N.Y.2d 476, 434 N.Y.S.2d 947, 415 N.E.2d 936, held that a statute which prohibited sodomy between unmarried persons (whether heterosexual or homosexual), but not between married couples, was unconstitutional:

> "*As to The Denial of defendants' right to equal protection*. Section 130.38 of the Penal Law on its face discriminates between married and unmarried persons, making criminal when done by the latter what is innocent when done by the former. With that distinction drawn, we look to see whether there is, as a minimum, 'some ground of difference that rationally explains the different treatment accorded married and unmarried persons' under the statute . . . In our view, none has been demonstrated or identified by the People . . . The statute therefore must fall as violative of the right to equal protection enjoyed by persons not married to each other." (434 N.Y.S.2d at 953, 415 N.E.2d at 942).[57]

[57] As discussed above (notes 44, 49), no equal protection claim was involved in *Doe v. Commonwealth's Attorney*, 403 F.Supp. 1199, because the Virginia statute condemned *all* acts of sodomy, both homosexual and heterosexual. Therefore, even if this Court is erroneous in its conclusion that the Supreme

Accord: *Commonwealth v. Bonadio*, 490 Pa. 91, 415 A.2d 47 (1980).

plaintiff's claims

The plaintiff claims that the "rational relationship" test is too lenient, and that the state must show a "compelling state interest" in order to justify the discrimination in § 21.06. Two arguments are advanced:

> (i) that § 21.06 discriminates on the basis of sex "in that a male may commit sodomy with a female, but not with a male, and a female may indulge in sodomy with a male, but not with a female";
>
> (ii) that homosexuals constitute members of a "suspect class" — and, like the previously recognized suspect classes of race, religion, national origin, and alienage — are entitled to the "compelling state interest" standard of review under *Frontiero v. Richardson*, 411 U.S. 677 [93 S.Ct. 1764, 36 L.Ed.2d 583] (1973).

Alternatively, the plaintiff contends that this Court should apply "the emerging intermediate level of review" which has been approved by the Supreme Court in equal protection cases involving discrimination on the basis of gender and illegitimacy." Here, the plaintiff relies upon such cases as *Mills v. Habluetzel*, 456 U.S. 91, 102 S.Ct. 1549, 71 L.Ed.2d 770 (1982) and *Plyler v. Doe*, ——— U.S. ———, 102 S.Ct. 2382, 72 L.Ed.2d 786 (1982).

Court's summary affirmance in *Commonwealth's Attorney* does not preclude a determination that the right of privacy extends to private homosexual conduct, it certainly does not affect the decision that § 21.06 violates the equal protection rights of the plaintiff and other homosexuals.

It is not necessary to reach these contentions.[58] This opinion has concluded that the plaintiff's right of privacy is violated because no "compelling state interest" justifies § 21.06 — and that there is a denial of equal protection because § 21.06 "bears no rational relationship to any legitimate state interest." Obviously, under either of the two equal protection standards urged by the plaintiff ("compelling state interest" or "intermediate level of review"), this Court would conclude that there is a denial of equal protection by § 21.06.

public distaste

The defendants claim that "it is undisputed that homosexual sodomy, far from being a proud and cherished tradition, is a practice which has been abhorred in western civilization and has long inspired an almost universal phobic response." Similar statements are found in some of the cases invòlving Texas sodomy statutes. See Appendix A; *Dawson v. Vance*, 329 F.Supp. 1320 (S.D. Tex. 1971).

These are overstatements. In several countries today, homosexuality is not criminal; and it has been decriminalized, without adverse effects, in some 21 states in this country.[59] But

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[58] If the issue were reached, this Court would hold that homosexuals are not a "suspect class" for equal protection purposes — since the Supreme Court has not even concluded yet that *sex* is a suspect class. *Frontiero v. Richardson*, 411 U.S. 677, 93 S.Ct. 1764, 36 L.Ed.2d 583. *See Holloway v. Arthur Andersen & Co.*, 566 F.2d 659 (9th Cir. 1977) (transsexuals are not a suspect class). *Cf. DeSantis v. Pacific Tel. & Tel. Co.*, 608 F.2d 327 (9th Cir. 1979) (homosexuals not "class" within Title VII protection); *Kirkpatrick v. Seligman & Latz, Inc.*, 636 F.2d 1047, 1050 (5th Cir. 1981).

[59] Dr. Judd Marmor, the plaintiff's expert, also testified that "Ford and Beach did a study of 76 societies and found in almost two-thirds of them, homophobia [an exaggerated fear of homosexuals among heterosexuals] did not exist and some form of homosexuality was permitted. One-third of the societies they studied did have the similar kind of restrictive attitudes towards overt homosexual behavior that ours does."

even if there is widespread public distaste, this would not be any "legitimate state interest" to rationalize a denial of equal protection — nor would it be a "compelling state interest" to justify a denial of the right of privacy. See *United States v. Moreno*, 413 U.S. 528, 534-35, 93 S.Ct. 2821, 2825-26, 37 L.Ed.2d 782 (1973). As discussed in *New York v. Onofre*:

> ". . . it has been deemed irrelevant by the United States Supreme Court that the purchase and use of contraceptives by unmarried persons would arouse moral indignation among broad segments of our community or that the viewing of pornographic materials even within the privacy of one's home would not evoke general approbation (*Eisenstadt v. Baird, Stanley v. Georgia*). We are not unmindful of the sensibilities of many persons who are deeply persuaded that consensual sodomy is evil and should be prohibited. That is not the issue before us. . . . The community and its members are entirely free to employ theological teaching, moral suasion, parental advice, psychological and psychiatric counseling and other noncoercive means to condemn the practice of consensual sodomy. The narrow question before us is whether the Federal Constitution permits the use of the criminal law for that purpose." (434 N.Y.S.2d at 951 n.3, 415 N.E.2d at 940 n.3).

Indeed, the Supreme Court has emphasized that cases involving controversial sexual issues must be resolved "by constitutional measurement, free of emotion and free of predilection" because the Constitution is made for people of fundamental differing views, and "the accident" of our finding certain opinions "novel and even shocking ought not to conclude our judgment upon the question" of constitutionality. *Roe v. Wade*, 410 U.S. at 116-17, 93 S.Ct. at 708-09, quoting the "now-vindicated dis-

sent" of Justice Holmes in *Lochner v. New York*, 198 U.S. 45, 76, 25 S.Ct. 539, 547, 49 L.Ed. 937 (1905).

Additional Matters

Several other matters raised by the parties must be addressed to show their consideration — and rejection — by this Court.

establishment of religion

The plaintiff's claim that § 21.06 violated the establishment clause of the first amendment was a second-line attack upon this statute. The evidence did not establish any such constitutional violation.

To the contrary, the testimony of the plaintiff's expert in religion (Dr. Furnish) was that private consensual homosexual conduct was not condemned by the bible, although he conceded other scholars disagreed with his opinions (see note 12). The plaintiff claims that, despite this disagreement among biblical scholars, "it is clear that Biblical law has been advanced as a reason for the enactment of this and similar laws." However, as discussed above, it is impossible to ascribe *any* intent to the legislature in its enactment of § 21.06. See Appendix A.

Therefore, § 21.06 does not violate the establishment clause because there was no proof that "the principal or primary effect of this statute was to advance or inhibit religion." *Harris v. McRae*, 448 U.S. 297, 318-20, 100 S.Ct. 2671, 2688-89, 65 L.Ed.2d 784 (1980).

abstention

The defendants claim that this Court should "abstain, in order to permit the state courts, or its legislature, to consider this most sensitive matter of state law based on grounds of comity and federalism."

This claim is baseless.[60] Neither *Younger* abstention nor *Pullman* abstention is appropriate.[61] See *Red-Bluff Drive-In, Inc. v. Vance*, 648 F.2d 1020, 1032 (5th Cir. 1981). There are no charges pending against plaintiff under § 21.06 (*Younger*). And, there is no "unsettled question of state law" which might dispose of the case without the need for constitutional adjudication (*Pullman*). It is clear that the only thing prohibited by § 21.06 is private, consensual homosexual conduct — and that, for the reasons discussed, it violates the plaintiff's right of privacy and his right to equal protection of the law.

standing

The defendants claim that, since the plaintiff faces no "genuine" or "real" or "credible" threat of prosecution, this action should be dismissed for lack of standing. They base this argument upon the fact that the plaintiff has never been arrested or threatened with prosecution under § 21.06 — and the fact that there is "no evidence that any person was ever prosecuted anywhere in Texas for consensual adult homosexual conduct in a private residence."

This contention, too, is erroneous. The plaintiff does have standing to attack the constitutionality of § 21.06. He faces a direct harm in the form of threatened prosecution since it is stipulated that both defendants "would prosecute the plaintiff and other homosexuals under [§ 21.06] if provable violations of the law come to their attention."

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[60] It is really a request that the plaintiff be denied relief. There is little likelihood that the Texas legislature will repeal § 21.06 (see Appendix A), and the state courts would certainly uphold the constitutionality of this statute. See Appendix A; *Torme v. State*, 525 S.W.2d 9, 11 (Tex. Cr. App. 1975).

[61] *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971); *Railroad Comm. of Texas v. Pullman*, 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941).

It is not necessary for the plaintiff to expose himself to actual arrest and prosecution in order to challenge § 21.06. *Babbitt v. United Farmworkers*, 442 U.S. 289, 99 S.Ct. 2301, 60 L.Ed.2d 895 (1979); *Steffel v. Thompson*, 415 U.S. 452, 94 S.Ct. 1209, 39 L.Ed.2d 505 (1974); *High Ol' Times, Inc. v. Busbee*, 621 F.2d 135 (5th Cir. 1980). As stated in *Babbitt*:

> "When contesting the constitutionality of a criminal statute, 'it is not necessary that [the plaintiff] first expose himself to actual arrest or prosecution to be entitled to challenge [the] statute that he claims deters the exercise of his constitutional rights.' *Steffel v. Thompson*, 415 U.S. 452, 459 [94 S.Ct. 1209, 1215, 39 L.Ed.2d 505] (1974) . . ." (442 U.S. at 298, 99 S.Ct. at 2308).

Although there may be practical problems in obtaining convictions under § 21.06 (see notes 5, 6), the threat of prosecution is "credible" and "real." For example, participants can be prosecuted if a third person observes their acts of homosexual sodomy. Moreover, § 21.06 can be — and has been — used by the state if there is some doubt as to whether the conduct occurred in a public place (see note 6). The state has certainly not "disavowed any intention" of invoking the statute in either of these instances. *Babbitt*, 442 U.S. at 302, 99 S.Ct. at 2311.[62]

In addition, it is clear that the plaintiff and other homosexuals suffer other detriments from § 21.06 besides the threat of prosecution and a $200 fine. For example:

> (i) Employers are reluctant to hire "criminals," and the testimony of a Dallas School Board member established

[62] It is not necessary to address the defendant Wade's baseless, *but imaginative*, argument that there is no standing because § 21.06 "may not ever be enforced against the plaintiff because of a myriad of circumstances under his control, e.g., a change in preference for sexual partners, *a surgical sex change*, or a physical inability to locate a suitable male sexual partner."

that prosecution, or even suspicion, of a violation of § 21.06 would have resulted in the termination of plaintiff's employment as a school teacher (see note 9).

(ii) The plaintiff's experts testified that severe anxieties are caused by threat of criminal punishment of homosexual conduct, and that this emotional distress could result in mental disorders. The plaintiff's testimony confirms this.

(iii) As reflected in reported cases, § 21.06 has been the basis (at least in part) for denial of probation in criminal cases, the alleged harassment of patrons of known homosexual bars, the refusal of employment, and the denial of citizenship to aliens.[63]

Accordingly, the plaintiff does have standing to attack the constitutionality of § 21.06, which makes him a "criminal."

Conclusion

Homosexuality is an emotional and controversial issue in our society. It causes fear and disgust among many people. This may well result in condemnation of this decision — but, if so, the critics should at least have a clear understanding that this decision has little effect upon the general public.

At issue is a statute which is not enforced by criminal prosecutions; and, even if it were, the only punishment is a fine of $200 or less. But this statute, § 21.06, makes criminals out of more than 700,000 individuals in Texas who are homosexuals, although they did not choose to be, and who engage in private sexual conduct with other consenting adults. This is

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[63] See Appendix A, discussing *Torme v. State* (probation), *Cyr v. Walls* (alleged harassment), *Childers v. Dallas Police Dept.* (refusal of employment), and *Longstaff v. Immigration & Naturalization Service*, 538 F.Supp. 589 (N.D. Tex. 1982) (citizenship).

prohibited by the constitutional right of privacy (as well as equal protection of the law) — because, if it were not, the state would have the same power to intrude into the private lives and bedrooms of heterosexuals, and regulate the intimate sexual relationships of married couples and single males and females.

Of course, this decision does not mean that the Constitution shields *all* types of homosexual conduct or that it "unqualifiedly sanctions personal whim." *Doe v. Commonwealth's Attorney*, 403 F.Supp. at 1204-05 (Merhige, J., dissenting). There is no constitutional protection if force is used, or if a minor is involved, or if the sexual conduct takes place in public, and this is true whether heterosexuals or homosexuals are involved.[64]

Homosexuals, like heterosexuals, are still subject to prosecution — just as they have been for years, *under Texas Penal Code provisions not involved in this case* — for (i) rape and sexual abuse by force, §§ 21.02 and 21.04, (ii) sexual offenses involving children, §§ 21.09-21.11, and (iii) sexual conduct or indecent exposure in a public place, §§ 21.07 and 21.08. See Appendix A.

Nor does this decision mean that all consensual activities in private are constitutionally protected, or that an individual has an absolute right to do whatever he pleases in his own home. Obviously, the right of privacy does not apply to private conduct harmful to the individual participants or to society, such as the use of harmful drugs. See *New York v. Onofre*, 434 N.Y.S.2d at 952-53, 415 N.E.2d at 941-42.

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[64] "Absent is the factor of commercialization with the attendant evils commonly attached to the retailing of sexual pleasures; absent the elements of force or of involvement of minors which might constitute compulsion of unwilling participants or of those too young to make an informed choice; and absent too intrusion on the sensibilities of members of the public, many of whom would be offended by being exposed to the intimacies of others." *New York v. Onofre*, 434 N.Y.S.2d at 952, 415 N.E.2d at 941.

But, for the reasons discussed above, the right of privacy does extend to private sexual conduct between consenting adults — whether husband and wife, unmarried males and females, or homosexuals — and the right of equal protection condemns a state statute which (like § 21.06) prohibits homosexual sodomy, but not heterosexual sodomy, without any rational basis.

APPENDIX A — THE TEXAS SODOMY LAWS

1. *Article 342*

There have been three sodomy statutes in Texas. The first, Article 342 of the Texas Penal code, was adopted in 1860 (four years after the initial criminal code had been enacted in 1856). It provided:

> "Whoever commits with mankind or beast *the abominable and detestable crime against nature* shall be confined in the penitentiary for not less than five nor more than fifteen years."

Since sodomy was not defined — indeed, "the charge was too horrible to contemplate and too revolting to discuss," *Harvey v. State*, 55 Tex.Cr.R. 199, 115 S.W. 1193 (1909) — Texas courts "looked to the common law for the elements of [this] crime," and surprisingly held that this statute did not condemn oral sex, but only anal sodomy and bestiality. *Pruett v. State*, 463 S.W 2d 191 (Tex.Cr.App. 1970). *Prindle* v. *State*, 31 Tex. Cr. R. 551, 21 S.W. 360 (1893) held:

> ". . .'Sodomy, which is the abominable and detestable crime against nature known to the common law, is, by article 342 of the Penal Code made an offense' in this state;

> and, being undefined, we must look to the common law for the elements of this crime. *Ex parte Bergen*, 14 Tex. App. 52. 'To constitute this offense, the act must be in that part where sodomy is usually committed. The act in a child's mouth does not constitute the offense.' 1 Russ. Crime, p. 937; *Rex v. Jacobs, Russ. & R.* 331. . . . However vile and detestable the act [of oral sex] proved may be, and is, it can constitute no offense, because not contemplated by the statute, and is not embraced in the crime of sodomy." (21 S.W. at 361).

Thus, for a period of 83 years in Texas, oral sodomy was not illegal — whether committed by man and wife, by unmarried male and female, or by homosexuals.[1]

2. *Article 524*

In 1943, the sodomy statute was amended to prohibit *all* oral or anal sex, even between persons who were married. Article 524 of the Texas Penal Code then provided:

> "Whoever has carnal copulation with a beast, or in an opening of the body, except sexual parts, with another human being, or whoever shall use his mouth on the sexual parts of another human being for the purpose of having carnal copulation, or who shall voluntarily permit

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[1] In 1925, Article 342 and other statutes were inadvertently omitted from the enrolled bill containing the Revised Penal Code of 1925. In *Ex parte Copeland*, 91 S.W.2d 709 (Tex. Cr. App. 1936), Judge Christian held that this did not repeal the sodomy laws:

> "To impute to the Legislature the intent to repeal the statutes defining incest, bigamy, seduction, adultery, and fornication is to lay at its door the charge of ignoring the moral sense of the people of this state and striking down some of the strongest safeguards of the home. That such was not the legislative intent is apparent from the enrolled bill."

> the use of his own sexual parts in a lewd or lascivious manner by any minor, shall be guilty of sodomy, and upon conviction thereof shall be deemed guilty of a felony, and shall be confined in the penitentiary not less than two (2) nor more than fifteen (15) years."[2]

For the next 31 years, it would be a felony for *anyone* in Texas — married couples, single males and females, male homosexuals or lesbians — to engage in oral or anal sodomy even in private with another consenting adult.[3]

Although sodomy had been "too horrible to contemplate and too revolting to discuss" in 1909, *Harvey v. State*, 55 Tex. Cr. R. 199, 115 S.W. 1193, times had changed by 1971, and *Pruett v. State*, 463 S.W.2d 191 (Tex. Cr. App. 1971), dism'd for want of substantial federal question, 402 U.S. 902, 91 S.Ct. 1379, 28 L.Ed.2d 643 (1971), gave this comprehensive definition:

> "In its broadest meaning, *sodomy* is the carnal copulation by human beings with each other against nature, or with a beast, in which sense it includes the crime against nature, *bestiality* (copulation between a human being and a brute of the opposite sex); *buggery* (carnal copulation of a man with beast); *cunnilingus* (the sex perversion com-

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[2] Although "sodomy" could be accomplished "only through the anus and not through the mouth," *Prindle v. State*, 31 Tex. Cr. R. 551, 21 S.W. 360, "carnal copulation" was construed to cover both oral and anal sex. *Furstonburg v. State*, 148 Tex. Cr. R. 638, 190 S.W.2d 362 (1945).

[3] "There are cases which say that it is *conceivable* that a husband and wife would be convicted of sodomy even though the proof established consent, and that it is the unnatural and prohibited ways of satisfying sexual desires that the statute is designed to prevent. 'Thus husband and wife, if violating this statute, could undoubtedly be punished, *whereas the normal sexual act would not only be legal but perhaps entirely proper*'" *Pruett v. State*, 463 S.W.2d at 193, quoting *State v. Nelson*, 199 Minn. 86, 271 N.W. 114 (1937).

> mitted with the mouth and the female sexual organ); and *fellatio* (an offense committed with the male organ and the mouth). In its narrower sense, *sodomy* is the carnal copulation between two human beings per anus, or by a human being in any manner with a beast. 81 C.J.S. Sodomy § 1(a), 367." (463 S.W.2d at 195).[4]

Article 524 was declared unconstitutional in *Buchanan v. Batchelor*, 308 F.Supp. 729 (N.D.Tex. 1970), reversed on other grounds, 401 U.S. 989, 91 S.Ct. 1222, 28 L.Ed.2d 526 (1971), by a three-judge panel because the statute prohibited the private, consensual acts of married couples, and thus violated their constitutional right of privacy. However, the Texas Court of Criminal Appeals refused to follow this decision — which was remanded to the district court for a determination of whether *Younger* abstention was proper (401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669) — and continued to uphold the constitutionality of Article 524. *Pruett v. State*, 463 S.W.2d 191 (Tex.Cr.App. 1971), dism'd for want of substantial federal question, 402 U.S. 902, 91 S.Ct. 1379, 28 L.Ed.2d 643 (1971); *Buchanan v. State*, 471 S.W.2d 401 (Tex.Cr.App. 1971), *cert. denied*, 405 U.S. 930, 92 S.Ct. 984, 30 L.Ed.2d 804 (1971).

Another federal district court in Texas also refused to follow the *Buchanan* decision. In *Dawson v. Vance*, 329 F.Supp. 1320 (S.D.Tex. 1971), the case was dismissed — on *Younger* abstention grounds as to the homosexual plaintiff seeking to enjoin pending sodomy charges in the state court; on "no case or controversy" grounds as to the married couple who intervened, but who had not been threatened with prosecution under

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[4] In 1980, a Texas Monthly article described it more succinctly: "a sexual technique that sounded both anatomically exacting and excruciatingly painful." Texas Monthly, p. 109 (defendant Wade's exh. 1).

Article 524.[5] However, the court left no doubt that it *would not* extend the right of privacy to private consensual acts of sodomy:

> "The state statute in question, Article 524, Texas Penal Code, forbids and condemns the practice of sodomy. Sodomy is an act upon or concerning the physical being of a person. It is an act of immemorial anathema both at common law, wherein it was punishable by death, 81 C.J.S. Sodomy § 1, p. 370, and in ancient times. Genesis 19: 1-29. It is clearly an offense involving moral turpitude whether defined by common law or by statute. The practice is inherently inimical to the general integrity of the human person. *This is a postulate not of dogma but of common knowledge. It warrants the dignity of judicial knowledge.* The primary authority and responsibility of the several states to forbid and control otherwise natural libidinal vice could scarcely be questioned. Their primary power over aberrational libidinal vice is no less sure. Sodomy is, therefore, in the general sense a crime the control of which is clearly within the reserved and police powers of the several states. . . ." (329 F.Supp. at 1322) (emphasis added).

3. *Section 21.06*

In January of 1974, a new penal code was enacted — the first comprehensive reform of the state's criminal laws since

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[5] The court even seemed to have some doubt as to whether the married couple had committed sodomy: in their petition, they "purport to admit to acts of sodomy committed within their alleged marital union. These allegations in the form of admissions are conclusionary in nature" (329 F.Supp. at 1323). But see *Quinonez v. National Ass'n of Securities Dealers, Inc.*, 540 F.2d 824 (5th Cir. 1976).

the initial code had been enacted in 1856. As part of this general reform, the laws concerning sexual offenses were substantially revised. Fornication, adultery, and seduction on promise of marriage were no longer crimes. And, all penalties for sodomy between consenting adults of the opposite sex in private were repealed — so, for the past 8 years in Texas, only homosexuals have been prohibited from engaging in private, consensual sodomy.[6]

Article 524 (Sodomy) was replaced with § 21.06 (Homosexual Conduct), which condemned only oral or anal sex between consenting adults of the same sex:

> "A person commits an offense if he [or she] engages in deviate sexual intercourse with another individual of the same sex.
>
> "'Deviate sexual intercourse' means any contact between any part of the genitals of one person and the mouth or anus of another person."

Punishment was drastically reduced, from a felony (2-15 years imprisonment) to a Class C misdemeanor (fine not to exceed $200). Searcy and Patterson, Practice Commentaries to Chapter 21 — Sexual Offenses, Texas Penal Code Ann. §§ 21.01-21.12 (Vernon 1974).

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[6] The plaintiff's requests for admissions asked the defendants to concede that § 21.06 "prohibits a male from engaging in 'deviate sexual intercourse' with another male, but does not prevent such conduct if performed with a female." The response, with an unfortunate but Classic Typo:

> "Section 21.06 proscribes a *mole* engaging in 'deviate sexual intercourse' with another *mole* and likewise proscribes a female engaging in 'deviate sexual intercourse' with another female. The definition of 'deviate sexual intercourse' is not limited to conduct between persons of the same sex."

See *et cetera*, "Somewhat Great Moments in the Law," Dallas Bar Headnotes (July 1982).

No legislative history is available to assist this Court in determining the intent of the legislature in passing § 21.06 — i.e., why penalties for oral and anal sodomy between males and females were repealed, but those against private and consensual homosexual conduct were retained. The Court asked the parties to supply legislative history, and the defendant Wade furnished this information:

> "The Attorney General's Office in Austin assisted in responding to the Court's request and advised that no readily available data exists as to the legislative history of Section 21.06. It was explained that the state procedure, unlike the procedure attending Acts of Congress, does not involve either the preparation or filing of a 'legislative history' as to any bill. Neither the committee debates nor reports are recorded. A bill [is] usually referred to the Legislature with a one-page report of transmittal.
>
> "Tapes of the 1974 Penal Code revision are on file in Austin, but are flawed by the absence of an index, by the sheer quantum and by the belief by the staff at the state library having custody thereof that the likelihood of locating any such legislative history as to Section 21.06 is remote, at best. The University of Texas Law School Library has a good many of the papers prepared incident to the Penal Code, but this option has the same flaws associated with the tapes, coupled with the uncertainty that these papers could be imputed to the Legislature as its declaration of interest." (Defendant Wade's post-trial brief, p. 23.)

A similar description of the lack of legislative history for § 21.06 appears in Von Beigel, The Criminalization of Private Homosexual Acts: A Jurisprudential Case Study of a Decision by the Texas Bar Penal code Revision Committee, 6 Human

Rights 23 (1977). However, this article also states that, although the author had not examined the available tape recordings at any great length "other research indicates that the Penal Code Revision Subcommittee of the House Committee on Criminal Jurisprudence *did* seriously consider the decriminalization of the private homosexual acts of consenting adults, but decided to support § 21.06 as proposed, *fearing a backlash effect against the entire Penal Code should such acts be decriminalized.*"

Actually, the legislature did not prohibit *all* homosexual conduct by § 21.06. That statute condemned only contact between the genitals of one person and the mouth or anus of another of the same sex. Thus, § 21.06 does not prohibit homosexuals from kissing, hugging, or sexually stimulating their partners with hands and fingers. Nor did § 21.06 condemn the use of any artificial device — such as a vibrator or dildo — until amended in 1981 to prohibit "the penetration of the genitals or the anus of another with an object." Texas Penal Code Ann. § 21.06 (Vernon Supp. 1982).

The revised penal code does prohibit both heterosexual and homosexual rape, § 21.02 (Rape) and § 21.04 (Sexual Abuse) . . . sexual conduct in public by both homosexuals and heterosexuals, § 21.07 (Public Lewdness) and § 21.08 (Indecent Exposure) . . . and both heterosexual and homosexual offenses involving children, § 21.09 (Rape of a Child), § 21.10 (Sexual Abuse of a Child), and § 21.11 (Indecency with a Child). However, the code does contain some puzzling inconsistencies:

> (i) Acts involving "contact between the person's mouth or genitals and the anus or genitals of an animal or fowl" are prohibited only if they occur "in a public place, § 21.07 (Public Lewdness). No section condemns such conduct in private. Thus, one may engage in private sexual

acts of bestiality — but not in private oral or anal sex with a consenting adult of the same sex, § 21.06 (Homosexual Conduct).

(ii) It is a defense to the statutory rape of a child under 17 if the defendant is "not more than two years older than the victim," but there was no such defense to indecency with a child (§ 21.11) until this was added by amendment in 1981. Thus, for a period of seven years after 1974, a 17-year-old boy could have been prosecuted as a felon "for fondling a 16-year-old girl at her invitation in private, but not for engaging in sexual intercourse with her." Tex. Penal Code Ann. § 21.11 (Practice Commentary) (Vernon 1974 and Supp. 1982).

In the 1975 session of the Texas legislature, a bill was introduced to repeal § 21.06. It was defeated in the House of Representatives by a vote of 112-16.[7] Unsuccessful efforts were also made to repeal § 21.06 in the 1977 and 1979 sessions, but no attempt was made in 1981. The plaintiff, Donald Baker, participated in the 1979 effort, but the bill "did not even get out of committee." He testified that, in his opinion, any attempt to repeal § 21.06 in 1983 would fail because most legislators do not want to commit "political suicide by voting for queers."

Although there has been no constitutional attack upon § 21.06, it has been involved in several reported cases. Two were state cases. Three were decisions by other federal judges in this district; none of these involved a direct challenge to the

[7] The plaintiff, by Motion to Reopen the Evidence and Take Judicial Notice of Legislative History, asked this Court to take judicial notice of "an approximate transcript" of the hearing held on this 1975 bill. This "approximate transcript" indicates that some legislators found the bill and homosexuals distasteful. However, except for the vote on the bill, this Court has refused to take judicial notice because the "approximate transcript" is merely a copy of unofficial notes taken by some unidentified person.

constitutionality of § 21.06, although one judge reached a different conclusion about the effect of the summary affirmance by the Supreme Court in *Doe v. Commonwealth's Attorney*.

In *Torme v. State*, 525 S.W.2d 9 (Tex. Crim. App. 1975), the defendant's parole was revoked because of an act of homosexual rape, but the court also noted that the evidence clearly reflected a violation of § 21.06. And, in *Head v. Newton*, 596 S.W.2d 209 (Tex. Civ. App. — Houston 1980), the court held it was still "slanderous per se" to call someone a "queer," because "it imputes the crime of sodomy" under § 21.06.

Cyr v. Walls, 439 F.Supp. 697 (N.D. Tex. 1977) involved a class action brought "on behalf of all gay persons in the City of Fort Worth" to enjoin alleged surveillance and harassment by city police. In deciding the class issues, *Judge Mahon* stated in dicta that "there can be no doubt that such state sodomy and homosexuality laws [like § 21.06] are constitutional," citing *Doe v. Commonwealth's Attorney*, 403 F.Supp. 1199 (439 F.Supp. at 701). However, it was not necessary for Judge Mahon to analyze or decide this issue — because, as he emphasized, the plaintiffs were not seeking relief from any conduct condemned by § 21.06, but for protection from alleged police harassment while they were "engaged in lawful activities of peaceful assembly and association." Judge Mahon did not decide the merits of these claims, but certified classes limited to those persons who were in attendance at regularly scheduled meetings of a gay rights organization, the services of a gay church, and certain named gay bars.

In re Longstaff, 538 F.Supp. 589 (N.D. Tex. 1982), *appeal pending*, involved a naturalization petition. *Judge Estes* held that the plaintiff, an admitted homosexual, had not been "lawfully admitted to the United States," 8 U.S.C. § 1427(a), because he had committed sodomy in England and, therefore,

was a "psychopathic personality."[8] Judge Estes also held that the plaintiff had not sustained the burden of proving his "good moral character" as required by 8 U.S.C. § 1427(e) because, *among other reasons*, he had engaged in violations of § 21.06, the Texas sodomy statute. Judge Estes recognized that this decision was inconsistent with *Nemetz v. Immigration & Naturalization Service*, 647 F.2d 432 (4th Cir. 1981) — but, more importantly, he was not faced with any direct constitutional attack upon the validity of § 21.06, as in this case.

Finally, in *Childers v. Dallas Police Department*, 513 F.Supp. 134 (N.D. Tex. 1981), affirmed without opinion, 669 F.2d 732 (5th Cir. 1982), a homosexual brought suit because he was not hired by the Dallas Police Department.[9] He raised a number of claims; among these was the assertion that the right of privacy extended to private homosexual conduct and that Police Department's refusal to hire him violated this right. But *Judge Porter* made it clear that he was not faced with any challenge to the constitutionality of § 21.06. He emphasized that "this is not a case where such solicitude [for the right of privacy] is appropriate. The situation here is not one where the State is seeking to use its criminal processes to coerce per-

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[8] But see *Lesbian/Gay Freedom Day Committee, Inc. v. Immigration & Naturalization Service*, 541 F.Supp. 569 (N.D. Cal. 1982), which — based upon "the preponderance of medical evidence that homosexuality is not a mental disease, disorder or psychopathic personality trait" — held that (i) the INS policy of per se exclusion of homosexual aliens from entry into the United States violates the first amendment, and (ii) that any exclusion of a homosexual alien from entry based upon his "sexual deviation" must be accompanied by medical certification that he is afflicted "with excludable physical or mental defect."

[9] The Code of Conduct of the Dallas Police Department "makes any violation of federal or state statutes a ground for discharge or disciplinary action," prohibits "cohabitation with a sex pervert of the same sex," and condemns "any conduct which, if brought to the attention of the public, could result in unfavorable criticism of the employee or the Police Department." *Childers v. Dallas Police Dept.*

sons to comply with the moral judgments of the majority." And, Judge Porter denied relief in *Childers* because he concluded that the "police department's actions [in refusing to hire a homosexual] were rationally related to a legitimate government end," and that "the government's interests far outweigh any interest Childers had in constitutional protection for his homosexual behavior."

> ". . . There are a myriad of grounds upon which the police departments actions and the regulations upon which those actions were based may be found appropriate for the full and efficient accomplishment of the police department's mission. The regulation serve to protect the integrity of the police department and to maintain discipline. There is a legitimate concern about tension between known and active homosexuals and others who detest homosexuals. There are also legitimate doubts about a homosexual's ability to gain the trust and respect of the personnel with whom he works. Moreover, the police department could rationally conclude that tolerance of homosexual conduct might be construed as tacit approval, rendering the police department subject to approbation and causing interference with the effective performance of its function."

See Beller v. Middendorf, 632 F.2d 788 (9th Cir. 1980); *Webster v. Redmond*, 599 F.2d 793 (7th Cir. 1979), *cert. denied*, 444 U.S. 1039, 100 S.Ct. 712, 62 L.Ed.2d 674 (1980).

In his *Childers* opinion, Judge Porter stated that the summary affirmance in *Doe v. Commonwealth's Attorney*, 403 F.Supp. 1199, (E.D.Va. 1975), *affirmed without opinion*, 425 U.S. 901, 96 S.Ct. 1489, 47 L.Ed.2d 751 (1976), "seems to imply that homosexual conduct does not enjoy special constitutional protection under the due process clause." He briefly considered

Carey v. Population Services, 431 U.S. 678, 688 n.5, 97 S.Ct. 2010, 2018 n.5, 52 L.Ed.2d 675, but noted that "without an authoritative Supreme Court holding to the contrary, the Supreme Court ruling in *Doe*, though summary, is binding on this Court under the rule of *Hicks v. Miranda*, 422 U.S. 332 [95 S.Ct. 2281, 45 L.Ed.2d 223] (1975)." This opinion reaches a different conclusion because of the detailed analysis presented on pages 29-32. In addition:

> (i) Although Judge Porter briefly dismissed *Carey* as a plurality opinion, he did not refer to the fact that six Justices agreed that the summary affirmance in *Commonwealth's Attorney* did not definitively answer the difficult question of whether the right of privacy extends to private sexual conduct between consenting adults (431 U.S. at 688, 97 S.Ct. at 2018); and
>
> (ii) Judge Porter's decision in *Childers* was rendered (March 30, 1981) before the Supreme Court had denied certiorari in *New York v. Onofre*, [51 N.Y.2d 476], 434 N.Y.S.2d 947 [45 N.E.2d 936] (May 18, 1981).

Finally, there was no direct "equal protection" attack upon § 21.06 in *Childers*, as there is in this case.[10] And, as discussed above, even if this Court is not correct about the effect of the Supreme Court's summary affirmance in *Commonwealth's Attorney* on the "right of privacy issue," this does not affect the decision that § 21.06 violates the equal protection rights of the plaintiff by discriminating against homosexuals without any rational basis.

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[10] Judge Porter did conclude that the Dallas Police Department's regulations were reasonably related to a legitimate government end, and, therefore, did not deny the plaintiff equal protection of the law. However, this analysis (note 22) concerned the regulations and "the treatment received by other violators of the law" (such as occasional marijuana smokers, note 19), and did not consider the discrimination between homosexuals and heterosexuals under § 21.06.

Appendix C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

DONALD F. BAKER,
Plaintiff,
VS. CA 3-79-1434-R
HENRY WADE, ET AL.,
Defendants.

FINAL JUDGMENT
(FILED SEPTEMBER 30, 1982)

This action came on to be tried before this Court on or about June 15, 1981, and the evidence adduced by the parties have been carefully weighed and considered by this Court, and the Court having made its findings of fact and conclusions of law, which are contained in its memorandum opinion entered on August 17, 1982, it is hereby ORDERED, ADJUDGED AND DECREED:

1. That Section 21.06 of the Texas Penal Code is hereby declared to be in violation of the constitutionally protected right of privacy guaranteed by the First, Ninth and Fourteenth Amendments of the United States Constitution;

2. That this section of the Texas Penal Code is also declared to be in violation of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution;

3. That the enforcement of this statute is permanently enjoined;

4. That this judgment is binding on the named defendants Muncy and Wade, as well as on the members of the class

certified by this Court; and such defendants and all class members are permanently enjoined from enforcing the statute; and

5. That plaintiff shall have and recover reasonable attorneys' fees in the amount of $74,020.00, which attorneys' fees shall be taxed against the defendant State of Texas;

6. That costs and expenses are also taxed against the State of Texas in accordance with the attached order.

SIGNED this 30th day of September, 1982.

/s/_____
UNITED STATES DISTRICT JUDGE
JERRY BUCHMEYER

Appendix D

Donald F. BAKER, Plaintiff,
v.
Henry WADE, Defendant.
No. CA 3-79-1434-R.
United States District Court,
N.D. Texas,
Dallas Division

July 1, 1985.

SUPPLEMENTAL OPINION

BUCHMEYER, District Judge.

This opinion supplements the decision in *Baker v. Wade*, 553 F.Supp. 1121 (N.D. Tex. Aug. 17, 1982).[1]

It concerns two motions—a "Motion to Set Aside Final Judgment and Reopen the Evidence" and a "Motion to Intervene and Substitute Class Representative"—filed on behalf of Danny Hill, the District Attorney for the 47th Judicial District (Potter County, Texas) by Wm. Charles Bundren, a Dallas attorney who represents both District Attorney Hill and a group called "Dallas Doctors Against AIDS."[2]

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[1] Affirmed on other grounds, 743 F.2d 236 (5th Cir. Sept. 21, 1984), application for en banc hearing granted (5th Cir. Jan. 28, 1985). But see *Hardwick v. Bowers*, 760 F.2d 1202 (11th Cir. 1985).

[2] Another Dallas lawyer, Donovan Campbell, Jr., presently represents Dallas Doctors Against Aids ("DDAA") before the Fifth Circuit in the appeal of this case. He was "substituted" for Wm. Charles Bundren as the DDAA attorney on July 26, 1983, several months after Bundren had filed pleadings both on behalf of DDAA and District Attorney Hill before the Fifth Circuit. Bundren was an incorporator of DDAA; Donovan Campbell, Jr., is a trustee of DDAA, and the son of Dr. Donovan Campbell, another "Dallas Doctors Against Aids" trustee.

Neither Hill nor Bundren—nor Dallas Doctors Against AIDS "DDAA")—participated in the June 1981 trial of this case. Nor did they attempt to represent the defendants in this controversy until April 1983, almost six months after the final judgment was entered on September 30, 1982. For the following reasons, their motions are **DENIED**.

1. THE FACTUAL BACKGROUND

When this case was tried (June 1981), it was defended by the Attorney General of the State of Texas; by Henry Wade, the District Attorney of Dallas County; and by Lee Holt, the City Attorney of Dallas. Wade and Holt had been certified as representatives of a defendant class consisting of "all district, county and city attorneys in the State of Texas responsible for the enforcement of Texas Penal Code Ann. § 21.06 ('Homosexual Conduct')." (553 F.Supp. at 1125.)

This Court's decision was rendered on August 17, 1982. It held that § 21.06—which prohibits private, consensual sodomy between homosexuals—was unconstitutional because it violated the constitutional rights of privacy and equal protection. (553 F.Supp. 1135-45.) After a hearing concerning attorneys fees (42 U.S.C. § 1988), final judgment was entered on September 30, 1982.

The Potter County District Attorney's Office (both Danny Hill and his predecessor) elected not to participate in the trial of this case.[3] Neither Wm. Charles Bundren nor "Dallas Doctors Against Aids" participated in the trial; and, neither requested leave to appear as amicus curiae before this Court's decision (August 17, 1982) or before the entry of final judgment (September 30, 1982). There were no motions for new trial

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[3] Hill's predecessor, Thomas A. Curtis, was notified that any motion to intervene must be filed by September 1, 1980. (553 F.Supp. 1125 at n.1).

under Fed.R.Civ.P. 59(b)—by Hill, by Bundren or by DDAA—or, indeed, by anyone else.[4]

On October 28, 1982, a notice of appeal was filed by Potter County District Attorney Danny Hill.[5] On November 1, 1982, the State of Texas filed its notice of appeal. Neither the City of Dallas nor the County of Dallas appealed. Then, by letter dated March 9, 1983, the Texas Attorney General advised the Clerk of the United States Court of Appeals for the Fifth Circuit that the State had "concluded not to further prosecute this appeal." A formal motion to withdraw the State's appeal was filed on March 18, 1983, and it was subsequently granted.

Dallas Doctors Against Aids

The group know as "Dallas Doctors Against Aids" and its attorney, Wm. Charles Bundren, first appeared publicly in this case on February 23, 1983, when they sought leave to file an amicus brief with the Fifth Circuit. On March 10, 1983—one day after the State of Texas gave notice that it was dismissing its appeal[6]—the DDAA attorney, Wm. Charles Bundren, filed a motion with the Fifth Circuit to be substituted as counsel of record for Potter County District Attorney Danny Hill.[7] This

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[4] The *only* post-trial motion—besides those relating to attorneys fees and the form of judgment—was the defendant Wade's "Objections to the Court's Findings of Fact and Conclusions of Law" (filed September 10, 1982).

[5] No evidence had been presented at trial that Potter County (Amarillo) had a large or politically active group of homosexuals. Nor was there any evidence that District Attorney Danny Hill or his predecessor had vigorously enforced § 21.06. (553 F.Supp. at 1126-34.)

[6] The Texas Attorney General sent a copy of his March 9, 1983 letter dropping the State's appeal both to District Attorney Hill and to Wm. Charles Bundren, the DDAA attorney. Brief of Appellee, Appendix 2.

[7] On March 18, 1983, an original "Petition for Writ of Mandamus" was filed in the Texas Supreme Court seeking to force the Texas Attorney General to prosecute the State's appeal in this case; in this unsuccessful proceeding—filed

was granted, and Bundren represented both Hill and DDAA before the Fifth Circuit until July 26, 1983, when Donovan Campbell, Jr., filed an appearance of counsel for DDAA (see footnote 2).

However, on April 12, 1983, Wm. Charles Bundren — solely as the attorney for Potter County District Attorney Danny Hill — filed a "Motion to Set Aside Final Judgment and Reopen the Evidence" and a "Motion to Intervene and Substitute [Danny Hill] as Class Representative." So, before this Court, Bundren represents only Hill, and not DDAA.[8]

The AIDS Motions

The pending motions purport to be based upon a concern about "AIDS" — the "lethal and epidemic disease of Acquired Immunological Deficiency Syndrome " AIDS is, at present, a

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in the names of Potter County District Attorney Danny Hill, State Senator John Leedom (Dallas) and State Representative Bill Ceverha (Dallas) — Hill was represented by R. Gregory Lamb of the Washington Legal Foundation in Dallas.

[8] This Court has some concern about just who is the "real party in interest" as to the pending motions. Although both this Court and the Fifth Circuit have been asked to take "judicial notice" of hearsay articles in newspapers and general news magazines — such as Newsweek and the Dallas-Ft. Worth Gay News (Brief of Appellee, pp. 39, 46) — *which contain statements that DDAA is the real party behind the present motions*, it is not proper for this Court to consider such hearsay. Therefore, this Court will not indulge in speculation as to why District Attorney Hill filed his notice of appeal (see footnote 5), but has not even executed an affidavit in support of the pending motions. Nor will this Court consider hearsay statements in newspapers and magazines that "Dallas Doctors Against AIDS, a group of about 25 who say their mission is informative and research oriented," have become active in *Baker v. Wade* — and that the legal expenses in this case, before both this Court and the Fifth Circuit, will be borne by DDAA and Mr. Bundren's law firm. 69 ABA Journal 1014-15 (August 1983). It is simply not necessary to reach any "standing" issue in order to determine the pending motions.

mysterious, incurable, and often fatal disease — which, to date, has primarily affected homosexual males and, apparently to a lesser degree, intravenous drug users (drug addicts), Haitians, and hemophiliacs. (Affidavit of Dr. Kevin Murphy, Brief of Appellee, Appendix 9.)

In essence, the motions contend that "the public health and safety of all citizens of Texas will be harmed if the spread of AIDS is not stopped." And, they argue — *quite seriously*[9] — that § 21.06 is desperately needed to combat the AIDS menace, *so the State of Texas will be able to fight AIDS by exacting $200 fines from persons who engage in private, consensual homosexual conduct.*[10]

Hill-Bundren-DDAA maintain that "the acknowledged statistics show that homosexuals have accounted for a vastly disproportionate share of the AIDS cases (95% to 100% at the time of trial in this case; approximately 72% more recently)." And, they contend:

> "Rule 60(b)(2) recognizes a party's right to seek relief from a judgment on the basis of newly discovered evidence. *AIDS is newly discovered evidence*. The incidents of AIDS in persons who engage in homosexual conduct and its deathly public health threat are newly discovered evidence. *Although AIDS had been discovered at the time of trial, its direct relationship to homosexual conduct was*

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[9] There may be an appropriate term for this. See *Appendix A*, excerpt from Brief for Appellant Danny Hill (July 6, 1983), page 21, line 6, *the very first word*.

[10] "There are practical difficulties in prosecuting persons under § 21.06 for private homosexual conduct. If the acts are between two people in private, there may be no witness to testify at trial. . . ." (553 F.Supp. at 1126). Indeed, *the original defendants contended that "this case should be dismissed because no one is ever prosecuted under this statute."* (553 F.Supp. at 1124.) Hill-Bundren-DDAA make a similar argument before the Fifth Circuit. (Brief for Appellant, pp. 7-12).

> *not fully established.* AIDS is recognized by the medical community as one of the most deadly and proliferic (sic) diseases in recent memory and is directly related to homosexual conduct. The Court should consider the public health dangers which AIDS poses and its relationship to the type of conduct which is before the Court in this action. . . ." (Brief in Support of Motion to Set Aside Final Judgment and Reopen the Evidence, p. 4) (emphasis added).

In addition to "numerous magazine articles concerning AIDS and other sexually transmitted diseases in homosexual individuals," the motions are "supported" by certain affidavits, including that of Dr. Paul Cameron. There are no affidavits, however, from the original defendants or their attorneys in support of the pending motions.

In opposition, the plaintiff, Donald F. Baker, contends that there is no "newly discovered evidence" — and **that Hill-Bundren-DDAA are merely dissatisfied with this Court's decision, so they want to try the case again.** In addition, the plaintiff has submitted affidavits from experts who explain why, in their opinion, the Hill-Bundren-DDAA assertions concerning AIDS are simply not valid. (Brief of Appellant, Appendix 4-9). For example, Dr. Kevin Murphy of Dallas, who is the "Special Consultant on Acquired Immune Deficiency Syndrome" to the Texas Department of Health, describes the presently known characteristics of AIDS:

> "(a) [AIDS] is an explosively epidemic illness, characterized by person-to-person spread suggestive of a transmissible agent;
>
> "(b) it is highly associated with specific risk groups: *gay men*, recreational intravenous (IV) *drug users*, *Haitian* refugees and nationals, and, more recently, infants

born to affected mothers or mothers who are Haitian or use IV drugs, and *hemophiliacs*; in addition, a few cases have been reported in recipients of transfused blood. . . .

"(c) the mortality of AIDS is very high, but the ultimate mortality of cases followed for a sufficient period of time is not yet known;

"(d) the geographic distribution of AIDS is highly focal but spreading; it is first of all an American and Haitian disease. Cases in Europe have been few and have generally been associated with contact with Americans. . . .

"(e) Sexual contact with a case is significantly associated with transmission of AIDS. This is clearly demonstrated among gay men, but cases also occur among heterosexual contacts of IV drug users who do not use drugs themselves. However sexual contact is not the only means of transmission; blood-borne transmission appears to be a second major mode of transmission.

"(f) The risk of acquiring AIDS among gay men is directly proportional to the number of different sexual partners and the proportion of sexual partners who are anonymous. . . .

. . . . . .

"(h) There is no evidence to suggest that AIDS 'began' in the homosexual community, although this unfortunate population has served as an important sentinel for a disorder that obviously affects other populations as well. . . ."

The plaintiff's affidavits also argue that "to criminalize homosexuality is possibly the worst conceivable way to try and solve the problem of AIDS" because this simply serves "to drive the whole issue underground, so that surveillance and early diagnosis will be made that much more difficult, if not impossible." (Affidavit of Dr. Peter W.A. Mansell, Brief of Appellant, Appendix 4.)

However, the plaintiff and Hill-Bundren-DDAA do agree upon one thing: the epidemic of AIDS began in 1979 and it was first recognized by the medical profession about May or June of 1981. *See*, e.g., Affidavits of Dr. Kevin Murphy and Dr. Sigmund Friedman. Indeed, Dr. Friedman — an expert for Hill-Bundren-DDAA — states that "*AIDS did not become widely known in the medical profession until toward the end of 1981*, approximately coincident with the December 10, 1981, issue of *The New Journal of Medicine* and several important articles therein."

1983 Legislative History

Hill-Bundren-DDAA assert that "the courts should defer to the wisdom and counsel of the people's elected officials rather than substituting one judge's personal viewpoints on public policy." (Brief of Appellant, p. 35.) However, they have conveniently ignored what happened in the 1983 session of the Texas Legislature concerning § 21.06. Indeed, their very same "AIDS arguments" were presented to — *and rejected by* — the Texas Legislature in March and April of 1983.[11] Accordingly, this Court takes judicial notice of the following *additional* legislative history concerning § 21.06:[12]

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[11] The Texas Attorney General gave advance notice of his decision to drop the State's appeal in this case not only to District Attorney Hill, but also to Bundren and DDAA (see footnote 4). Therefore, it seems reasonable to assume that the same or similar arguments — based upon the "AIDS epidemic" — were also presented to, and rejected by, the Texas Attorney General before he dismissed the State's appeal.

[12] *Baker v. Wade*, 553 F.Supp. 1125-26, 1150-51. *See New York v. Ferber*, 458 U.S. 747, 102 S.Ct. 3348, 3350, 3355, 73 L.Ed.2d 1113 (1982).

On March 11, 1983, State Representative Bill Ceverha introduced HB 2138.[13] Wm. Charles Bundren, the attorney for DDAA, assisted Ceverha in drafting this bill. HB 2138, in essence, would have broadened § 21.06 to prohibit *any* homosexual conduct or "sexual contact."[14] And, *punishment was to be dramatically increased*: 2-10 years imprisonment and a $5,000 fine for the first offense ("third-degree felony"); 2-20 years imprisonment and a $10,000 fine for subsequent offenses ("second degree felony"). Tex.Penal Code Ann. §§ 12.33 and 12.34 (Vernon 1974).

On April 19, 1983, the House Criminal Jurisprudence Committee conducted hearings on HB 2138. Representative Ceverha presented testimony from *Dr. Paul Cameron* of Nebraska, Dr. Clem Mueller of Dallas, and two Dallas policemen. The Committee also heard testimony from the plaintiff in this case (Don Baker), his attorney (James C. Barber), and *Dr. W.A. Mansell* of Houston.

Dr. Cameron and Dr. Mansell gave conflicting testimony — similar to that contained in their affidavits filed in this Court (and before the Fifth Circuit). Specifically, Dr. Cameron testified, in substance, that AIDS is directly related to, and spread by, homosexual conduct — and that HB 2138 was needed to prevent homosexual conduct from destroying this country's public health. (Brief for Appellant, pp. 49-50). In contrast, Dr. Mansell testified that "there is no absolute evidence as to whether or not AIDS is directly related to homosexual conduct" . . . that "the likelihood of a gay person spreading the disease to

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[13] Representative Ceverha was one of the three parties who attempted, unsuccessfully, to force the Texas Attorney General to continue the appeal in this case by means of the petition for mandamus discussed in footnote 7.

[14] "Actually, the legislature did not prohibit *all* homosexual conduct by § 21.06. That statute . . . § 21.06 does not prohibit homosexuals from kissing, hugging, or sexually stimulating their partners with hands and fingers." (553 F.Supp. at 1151.)

a straight person by sexual contact is obviously very slight" . . . and that "it would be a public health disaster if the Court were to reverse its previous decision in this case, or if the proposed sodomy bill is passed by the Texas Legislature." (Brief of Appellee, Appendix 4.)

After the Committee heard this testimony — *the same "AIDS evidence" which "supports" the motions presented to this Court* — the Committee rejected the Hill-Bundren-DDAA arguments. Chairman Wayne Peveto (Orange) moved to refer HB 2138 to subcommittee; this was done and the bill died there at the close of the 1983 session in May.[15]

2. THE MOTION TO REOPEN THE EVIDENCE

The "Motion to Set Aside Final Judgment and Reopen the Evidence" is, of course, based upon Fed.R.Civ.P. 60(b). Specifically, claims are made under Rule 60(b)(2) ("newly discovered evidence which by due diligence could not have been discovered *in time to move for a new trial* under Rule 59(b)"); under Rule 609(b)(3) ("fraud . . . misrepresentation, or other misconduct"); and under Rule 60(b)(6) ("any other reason justifying relief from the operation of the judgment").

This Court has jurisdiction to consider the motion to reopen the evidence even though the case is pending on appeal. *Standard Oil Co. v. United States*, 429 U.S. 17, 97 S.Ct. 31, 50 L.Ed.2d 21 (1976). However, a Rule 60(b) motion is "an extraordinary motion," addressed to the discretion of the trial court. The "desirability of orderliness and predictability in the

[15] Representative Ceverha also introduced a bill that would have banned homosexuals from jobs in teaching, health care and other fields. He supported this legislation by the same "AIDS evidence." That bill, too, died in committee in May of 1983.

judicial process speaks for caution in the reopening of judgments." *Fackelman v. Bell*, 564 F.2d 734, 734 (5th Cir. 1977); *Johnson Waste Materials v. Marshall*, 611 F.2d 593, 597 (5th Cir. 1980). Although it may be normal for the losing party — or, here, persons who did not even participate in the trial, but who vehemently disagree with this Court's decision — to wish to retry the case and present additional evidence, permitting this "would lead to neverending litigation." *Ramsey v. United Mine Workers*, 481 F.2d 742, 753 (6th Cir. 1973).

Accordingly, it is clear that the present motion *does not* meet the requirements of Rule 60(b). In particular, the "evidence" relied upon is not "newly discovered evidence" . . . there has been no showing that the "evidence" could not have been discovered, in the exercise of "due diligence," in time to move for a new trial under rule 59(b) . . . and the supposed "new evidence" is certainly not sufficient to warrant a new trial or to change the result in this case. In addition, contrary to the claims of Hill-Bundren-DDAA, there was no "fraud or misrepresentation" in testimony given at trial — and there are no "other reasons" for granting relief under Rule 60(b).

The "Evidence"

When this motion was filed on April 12, 1983, it requested this Court to consider the 41 "medical articles" attached to the motion.[16] However, there was no supporting affidavit filed to establish that these articles appeared in periodicals considered authoritative and reliable in the medical profession. Fed.R.Evid. 803(18). In fact:

[16] The Fifth Circuit has been asked to take judicial notice of several articles which have not even been submitted to this Court. Compare Brief for Appellant, pp. viii-x with the appendix to the Motion to Set Aside Final Judgment and Reopen the Evidence.

(i) eight of the 41 articles were from general news or science magazines, such as Time, Newsweek, Saturday Evening Post, Science News and The Homosexual Network Magazine;

(ii) of the remaining 33 articles, 9 were published before the trial in this case (June 1981), another 12 were published before the judgment was entered (September 30, 1982), and *12 articles published later.*

After two months, on June 8, 1983, an affidavit was filed which did establish that "Cutis, The New England Journal of Medicine, The Western Journal of Medicine, The Postgraduate Medical Journal, and the American Journal of Public Health," and perhaps the Anals [*sic*] of Internal Medicine, were medical periodicals that could properly be considered by a medical expert under Rule 803(18). (Affidavit of Dr. Sigmund Friedman, p. 2). *However, none of the other articles were authenticated.* Therefore:

(i) only 25 of the original 41 "medical articles" were authenticated as such,[17]

(ii) of these 25 articles, 6 were published before the trial in this case, another 10 were published before the judgment was entered (September 30, 1982), *and 9 articles were published later.*

The character of the Hill-Bundren-DDAA "newly discovered evidence" is reflected in the initial Brief in Support of Motion to Set Aside Final Judgment and Reopen the Evidence (pp. 5-11). There, the brief selects quotations from four "of

[17] The articles not authenticated included an internal document from a medical school, articles from The American Journal of Nursing and the Journal of Homosexuality, and *an editorial* from the American Journal of Public Health.

the attached medical articles [to] assist the Court in recognizing the need to set aside the judgment and reopen the evidence because of the threat to the public's health." However, of these quotations:

> (i) two are from general news stories, not medical articles — one from Time magazine; and one from a general science magazine;[18]
>
> (ii) the third is from an authenticated medical article, but it does not even concern AIDS — and it was printed in February of 1980, some 16 months before trial;
>
> (iii) the fourth is from an authenticated medical article, but it was published after the August 17, 1982 decision — and, consequently, could not even be considered by this Court in connection with the Rule 60(b) motion.[19]

The only other "evidence" supporting the motion consists of affidavits — of Dr. Sigmund Friedman of New York, of Dr. Paul Cameron, a "licensed psychologist in the State of Nebraska," and of two Dallas dentists (Dr. Keith Thornton and Dr. Randy Richardson), and *testimony given in November of 1981* by Dr. Paul Cameron and Dr. Charles Webb, a physician employed by the Texas Department of Health, at the trial in *Gay Student Services v. Texas A & M University*, CA-H-77-325 (S.D. Tex. 1982).[20] These affidavits and this testimony will be discussed later.

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[18] In other words, this Court was *seriously* being asked to set aside its judgment because of "newly discovered evidence" in the form of articles in such eminent medical periodicals as Time, Newsweek, and the Saturday Evening Post. *See footnote 9.*

[19] "There can be no Rule 60(b)(2) relief for evidence which has only come into existence after the trial is over, for the obvious reason that to allow such a procedure could mean the perpetual continuation of all trials." *NLRB v. Jacob E. Decker & Sons*, 569 F.2d 357, 364 (5th Cir. 1978).

[20] *Gay Student Services v. Texas A & M University*, 737 F.2d 1317 (5th Cir. 1984).

No "New" Evidence Or Due Diligence

Under Rule 60(b)(2), Hill-Bundren-DDAA must establish that there is "newly discovered evidence" which, in the exercise of reasonable diligence, could not have been discovered at the time of trial — or in time to move for a new trial under Rule 59(b) after this Court's decision was rendered on August of 1982 and final judgment was entered on September 30, 1982. Fed.R.Civ.P. 60(b)(2); *Smith v. Missouri Pacific R. Co.*, 615 F.2d 683 (5th Cir. 1980); *Schepp v. Langmade*, 416 F.2d 276 (9th Cir. 1969); Wright & Miller, Fed.Prac. § 2859 (West 1973).

They have not done so. Indeed, *Hill-Bundren-DDAA have not presented a single affidavit from any of the parties or attorneys who participated in the trial of this case and the post-decision proceedings.* Accordingly, no showing has been made that the attorneys for the class representatives (District Attorney Wade, City Attorney Holt) were not aware of the proposed "AIDS evidence" before June of 1981, and that they simply elected not to present it as a matter of trial strategy. Nor has there been any showing that these original parties and attorneys could not have presented these matters, if they wished, either before this Court's decision on August 17, 1982 — *or by a timely motion for new trial within ten days after the final judgment was entered on September 30, 1982.*[21]

[21] Indeed, on August 15, 1982 — two days before this Court's decision — the Dallas Times Herald's lead article in the Metro section was a story concerning AIDS entitled "Deadly Illness Hits Homosexuals, Puzzles Doctors." A copy of this article is attached as Appendix B. Although it is hearsay and will not be considered by this Court as truth of the matters asserted, the article does contain discussions of most of the "newly discovered evidence" which Hill-Bundren-DDAA claim *could not* have been found with due diligence until April of 1983. This newspaper article, of course, is not essential to this decision — but it does illustrate that, if the original parties and attorneys had wanted to do so, they could have called these "AIDS matters" to the attention of the Court by a timely motion for new trial under Rule 59(b) *before October 10, 1982.*

Moreover, Hill-Bundren-DDAA actually concede that their proposed "newly discovered evidence" was "definitely in existence at the trial of this case in June of 1981" — and that *it could have been presented to the Court in late 1981 (some nine months before the decision was rendered).* In particular:

> . . . as discussed in the preceding section (The "Evidence"), 6 of the authenticated medical articles were published before trial, and another 10 were published before this Court's decision;
>
> . . . *by November of 1981*, both Dr. Charles Webb and Dr. Paul Cameron had given their testimony concerning homosexuals, AIDS, etc. at the trial of *Gay Student Services v. Texas A & M*, CA-H-77-325 (S.D. Tex. 1982), reversed 737 F.2d 1317 (5th Cir. 1984).[22]
>
> . . . Dr. Sigmund Friedman's affidavit specifically states that "while specific disease manifestations of AIDS, such as pneumocystis carinii pneumonia and Kaposi's sarcoma, had begun to appear and were in existence at the time of the trial in this case, the connection of these specific disease symptoms to the underlying disease syndrome now called AIDS *did not become widely known in the medical profession until toward the end of 1981*, approximately coincident with the December 10, 1981 issue of The New England Journal for Medicine and several important articles therein."

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[22] Indeed, this Court studied the briefs in the *Gay Student Services v. Texas A & M* before the August 17, 1982 decision was rendered in this case. Hill-Bundren-DDAA state: "As Dr. Webb's quoted testimony demonstrates, even the Chief Epidemiologist of the Texas State Department of Health was not aware of the AIDS evidence from across the country *until approximately the time of the June 1981] trial in "Baker v. Wade."* [Defendant's Reply to Plaintiff's Brief in Opposition, pp. 7-9].

Therefore, this Court is being asked to set aside its judgment upon the basis of (i) 6 medical articles published before trial, (ii) 10 additional medical articles published before final judgment was entered, and (iii) testimony by Drs. Cameron and Webb that was actually given in November of 1981. And, this request is based upon the bald assertion — *unsupported by any affidavit* — that the parties and the attorneys who tried this case could not discover this "evidence" because it was "difficult" to do so and because "a number of the medical articles . . . were just becoming available at or about the time of trial." Nor do Hill-Bundren-DDAA even attempt an explanation of why, in the exercise of reasonable diligence, this "new evidence" could not have been presented to this Court in late 1981[23] — or even the following year, before the August 17, 1982 decision — or, as Rule 60(b)(2) requires, by a Rule 59(b) motion for new trial before October 10, 1982.

There is no "newly discovered evidence." Nor have Hill-Bundren-DDAA shown any exercise of "due diligence." All they have shown is the fact that they disagree with the trial strategy of the class representatives and their attorneys — and that they wish to retry this case. Obviously, this is not a proper basis for relief under Rule 60(b)(2).

No Different Result

Hill-Bundren-DDAA also claim, as they must under Rule 60(b)(2), that their "newly discovered evidence" would require a different result:

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[23] If such a motion had been filed, it would have been considered. Indeed, on August 17, 1981, the plaintiff filed a motion for this Court to reopen the evidence and take judicial notice of certain "legislative history" concerning § 21.06 (553 F.Supp. at 1151) and certain laws of other states concerning sodomy. *The defendants opposed this motion.* It was granted in part by Order entered August 24, 1982, one week after the decision was issued.

> ". . . there can be no doubt in the instant situation that the proposed AIDS evidence is both eminently material and would probably require a different result from that rendered by the Court without the benefit of consideration of the AIDS evidence."[24]

This claim is baseless. Even if this Court were to consider all of the "evidence" submitted by Hill-Bundren-DDAA, there would be no different result in this case. There is no "compelling state interest justifying § 21.06 (right of privacy) — and this statute "bears no rational relationship to any legitimate state interest" (equal protection). 553 F.Supp. at 1141-45.

It is obvious that the Texas Legislature did not consider the AIDS problem when it passed § 21.06 as part of the general revision of the Penal Code in 1974. (553 F.Supp. at 1125-26, 1133-34). Indeed, the AIDS epidemic did not even exist at that time; as Hill-Bundren-DDAA concede, it was 1981 before this severe problem was even recognized by the medical profession. And, the only available legislative history indicates that the sole basis for § 21.06 was the fear of "a backlash effect against the entire [revised] Penal Code should [private homosexual] acts be decriminalized." (553 F.Supp. at 1150-51.)

This is confirmed by the 1983 legislative history concerning § 21.06. Representative Bill Ceverha — supported by Hill-Bundren-DDAA — attempted through HB 2138 to revise § 21.06 and drastically increase its penalties. The Texas Legis-

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[24] Their argument before the Fifth Circuit is even stronger. There, they assert that "this case does not involve any actual facts or controversy" . . . they ask the Fifth Circuit to take "judicial notice" of a number of "medical articles" (comparable to those presented to this Court) and of affidavits and testimony given in other cases . . . and to reverse and render judgment that § 21.06 is constitutional. *Surprisingly, they make these requests without directly attacking a single finding of fact made by this Court.* (553 F.Supp. at 1126). Once again, see footnote 9.

lature (through the House Criminal Jurisprudence Committee) considered — *and rejected* — the same "AIDS evidence" and arguments being presented to this Court. The fact that HB 2138 died in committee at the end of the 1983 session certainly indicates that the State has no "compelling" or "rational" interest in seeking to address the serious problems of AIDS by fining homosexuals $200 for engaging in private, consensual sexual conduct.

It is not necessary for this Court to resolve the differences between the "expert opinions" expressed in the affidavits filed by Hill-Bundren-DDAA[25] and those contained in the affidavits filed by the plaintiff. However, as to the major conflict — whether or not a criminal statute (§ 21.06 or HB 2138) is a valid means of addressing serious health problems such as the AIDS epidemic — the Hill-Bundren-DDAA arguments do present some problems:

> . . . if prohibiting private, consensual homosexual conduct will effectively combat AIDS, should the State of Texas also ban private, consensual heterosexual acts by Haitians, hemophiliacs and drug addicts?
>
> . . . if any criminal statute is "justified," shouldn't it be "narrowly drawn" to prohibit those persons who know that they have AIDS (whether homosexuals, Haitians, hemophiliacs, or drug addicts) from either having sexual contacts or donating blood?

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[25] However, most of the Hill-Bundren-DDAA affidavits do not constitute "newly discovered evidence" under Rule 60(b)(2). Some of the opinions stated could, with due diligence, have been presented to this Court before its decision was rendered (e.g., Drs. Simon and Webb). Some appear to be "current opinions" — i.e., they were formed after final judgment, and are no basis for relief under Rule 60(b)(2) (e.g., Drs. Thornton and Richardson). *NLRB v. Jacob E. Decker & Sons*, 569 F.2d at 364. And, others are simply disagreements with this Court's decision or the testimony which this Court heard and credited at trial (e.g., Drs. Friedman, Simon).

> . . . if criminal sanctions against private homosexual conduct will control the AIDS epidemic, should the State also try to stop herpes and other venereal diseases by prohibiting sex between men and women?[26]
>
> . . . if AIDS can be wiped out by statutes such as § 21.06, should the State consider passing criminal laws against other diseases?[27]

Fortunately, questions such as these are initially for the Texas Legislature, not this Court. And, just as the Texas Legislature did not find the Hill-Bundren-DDAA "AIDS evidence" convincing in its 1983 session, this Court concludes that the evidence is certainly not sufficient to require a different result in this case.

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[26] Hill-Bundren-DDAA also argue, both before this Court and the Fifth Circuit, that § 21.06 is justified by evidence of other "public health" considerations (hepatitis, syphilis, other venereal diseases). Brief for Appellant, pp. 41-43. However, they have not even attempted to establish that this is "newly discovered evidence" which could not, with due diligence, have been presented before this Court's decision. Indeed, it is contrary to the evidence presented at trial. (553 F.Supp. at 1141-43.)

[27] Clarence Darrow found such a system of justice in "Erehwon," a story by Samuel Butler: ". . . if some one had a disease he was at once sent to a criminal court. Mr. Jones, we will say, is led into court charged with tuberculosis. The judge asks him what he has to say for himself, and he replies that he was born with a weak constitution, that he is poor and has been forced to work in inclement weather and unventilated surroundings, and so developed tuberculosis. Thereupon the judge, with the judge's zeal for justice, turns over the pages of his docket and says, 'Mr. Jones, weren't you in this court a year ago for pneumonia?' The poor fellow replies 'Yes —' he had been working in the rain and cold, and had not known that it would cause pneumonia. The judge promptly replied that ignorance was no excuse for crime. On further examination it was disclosed that he was once in court afflicted with a severe cold; it was therefore clear that he was an habitual criminal, and thereupon he was sent to prison for life." Darrow, The Story of My Life pp. 357-58 (Gossett & Dunlap 1932).

No Fraud or Misrepresentation

The next argument by Hill-Bundren-DDAA is distressing. They claim that Dr. William Simon and Dr. Judd Marmor misrepresented facts to this Court and committed fraud with respect to their testimony, supposedly justifying a new trial under Fed.R.Civ.P. 60(b)(3).

At first, this claim was totally unsupported — by affidavit or otherwise. Then, after the plaintiff objected, Hill-Bundren-DDAA "supported" their claim of fraud and misrepresentation by two affidavits, both by Dr. Paul Cameron. Even then, Dr. Cameron did not *directly* accuse Drs. Simon and Marmor with fraud; instead, he merely expressed opinions contrary to theirs. *To seriously contend that a difference in "expert" opinions constitutes fraud and misrepresentation is ridiculous.*[28]

This Court will not dignify such a baseless assertion with a discussion. It will only emphasize two things: *First*, the opinions expressed at trial by Dr. Simon and Dr. Marmor — which were adopted by this Court — were supported by other evidence which is totally ignored by Hill-Bundren-DDAA, in their charges of fraud and misrepresentation. For example:

> (i) Dr. Marmor's testimony that, "although there was 'some disagreement,' almost all American psychiatrists feel that 'homosexuality per se does not constitute any form of mental disorder' " (553 F.Supp. 1129 at n.15) is supported by resolutions passed by the American Psychiatric Association, the American Psychological Association, the American Medical Association and others (553 F.Supp. at 1130).[29]

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[28] *A reference to footnote 9 is much too kind.*

[29] *See In re Longstaff*, 716 F.2d 1439, 1450 (5th Cir. 1983) ("That homosexuality is no longer considered a psychopathic condition is established by the opinion of the government's highest medical officer, the Surgeon General.")

(ii) Dr. Simon's testimony that homosexuality is the result of "a relatively long complex process of psychological and social development" is supported by the Task Force on Homosexuality, among other exhibits (553 F.Supp. at 1129-30).

Second, this Court reaffirms its findings that Dr. Simon and Dr. Marmor were very credible witnesses and that their qualifications were impeccable. In contrast, *Dr. Paul Cameron* — the basis of the claim that Drs. Simon and Marmor committed fraud in their testimony — *has himself made misrepresentations to this Court*. For example:

(i) his sworn statement that "homosexuals are approximately 43 times more apt to commit crimes than is the general population" is a total distortion of the Kinsey data upon which he relies — which, as is obvious to anyone who reads the report, concerns data from a non-representative sample of delinquent homosexuals (and Dr. Cameron compares this group to college and non-college heterosexuals);

(ii) his sworn statement that "homosexuals abuse children at a proportionately greater incident than do heterosexuals" is based upon the same distorted data — and, the Court notes, is directly contrary to other evidence presented at trial besides the testimony of Dr. Simon and Dr. Marmour. (553 F.Supp. 1130 at n.18.)[30]

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[30] Similar testimony by Dr. Cameron was totally discounted by the Fifth Circuit in *Gay Student Services v. Texas A & M University*, 737 F.2d 1317, 1330 (5th Cir. 1984); there, the Court rejected the claim that Texas A & M's recognition of a gay student organization "was justifiable as an appropriate means of protecting public health" because:

". . . TAMU has simply not proven that recognition will indeed imminently result in such dire consequences. *The speculative evidence*

There has been no fraud or misrepresentations except by Dr. Cameron, the supposed "expert" for District Attorney Hill.[31] Accordingly, the motion under Rule 60(b)(3) is baseless.

No "Other Reasons" to Reopen Evidence

Hill-Bundren-DDAA also ask for relief under Fed.R.Civ.P. 60(b)(6), which permits a district court to reopen the evidence for "any other reason justifying relief" from the operation of the final judgment. Here, the only new claim is that:

> ". . . there was very little if any evidence offered concerning the nature and extent of homosexual conduct in the State of Texas. The Court was offered very little evidence concerning what homosexuals do and why

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offered by the defendants' experts [including Dr. Paul Cameron] 'for which no historical or empircal [*sic*] basis is disclosed,' cannot justify TAMU's content-based refusal to recognize GSS. *Gay Lib [v. University of Missouri] supra*, 558 F.2d [848], at 854 [8 Cir. 1977]. We think that on this record TAMU's public health argument is precisely the kind of 'undifferentiated fear or apprehension' that the Supreme Court has repeatedly held 'is not enough to overcome the right to freedom of expression.' *Tinker [v. Des Moines Independent Community School Dist.], supra*, 393 U.S. [503] at 508, 89 S.Ct. [733] at 737 [21 L.Ed.2d 731 (1969)]; *Healy [v. James], supra*, 408 U.S. [169] at 191, 92 S.Ct. [2338] at 2351 [33 L.Ed.2d 266 (1972)]." (emphasis added.)

[31] Indeed, the plaintiff contends that Dr. Paul Cameron is not a credible witness because he resigned from the American Psychological Association to avoid an investigation into charges of his unethical conduct as psychologist. The charges of unethical conduct against Dr. Cameron included his continuing misrepresentation of Kinsey data and other research sources on homosexuality; inflammatory and inaccurate public statements about homosexuals; and his fabrications to a Nebraska newspaper about the supposed sexual mutilation of a four year old boy by a homosexual. *See Psychology, Homosexuality, and Human Rights in Lincoln, Nebraska*, by Dr. James K. Cole; Affidavit of Dr. William Simon.

> homosexual conduct poses such a severe public health threat to the citizens of the State of Texas. The case was tried on the basis of homosexuality as a state of being or lifestyle rather than on the specific acts of 'homosexual conduct.' Common homosexual practices such as 'rimming,' 'scat,' 'handballing,' 'golden showers,' the insertion of various objects into the anus of individuals and oral/anal, oral/penal and penal/anal conduct were not referred to or discussed in depth. The variety of sexual conduct, in conjunction with the frequency of anonymous sexual partners poses substantial considerations which were not presented to the Court in the trial of this matter. . . ."

This request, too, is baseless. It reveals that Hill-Bundren-DDAA have simply not examined either the trial transcript or the exhibits in this case. This Court did receive and consider evidence concerning homosexual conduct, promiscuity among homosexuals, drug usage among homosexuals, and "common homosexual practices." *See*, e.g., 553 F.Supp. 1131 at n.13 and 14; 553 F.Supp. at 1134. Although it was not necessary to describe this evidence in detail in the original opinion, two examples should suffice:

> ". . . The current sexual rage is a practice in which the fist is inserted directly in the partner's anus. Once thought outrageous, this activity has become a standard vogue, with Crisco used as the preferred lubricant. Now considerably more exotic forms of anal penetration have assumed the vanguard on the kinky fringe of gay sexual practices."
>
> ". . . there were [in the Eagle Leather/Maple Ranch Wear Boutique] also some nifty bandannas in a wide array of colors. The reason for all the colors? Well, in the hard-

> core gay bar scene there is a nation-wide code for handkerchiefs that are placed in the back pockets of one's pants. If you're a golden showerer, for example, and want to urinate on someone, then you stick a yellow handkerchief in your left back pocket and hope to run into somebody with a yellow handkerchief in his right back pocket, which means he likes to be urinated on. There are twelve official colors relating to various sexual proclivities. The bandannas are just the C & W version of the system."[32]

Accordingly, the evidence proposed by Hill-Bundren-DDAA would be cumulative and, as the plaintiff correctly contends, totally immaterial. There is no basis for relief under Rule 60(b)(6) — particularly since this rule is intended for "extraordinary cases." *Gray v. Estelle*, 574 F.2d 209, 215 (5th Cir. 1978), citing *Ackermann v. United States*, 340 U.S. 193, 200, 71 S.Ct. 209, 212, 95 L.Ed. 207 (1950).

3. THE MOTION TO INTERVENE

Danny Hill, the District Attorney of Potter County, is a member of the defendant class certified by this Court. (553 F.Supp. at 1125.) By the motion to intervene, he seeks to be substituted as class representative. However, *the motion is not supported by any affidavit*. Hill has made no attempt to show that he would be an adequate representative of the class, as required by Fed.R.Civ.P. 23(a). He has not complied with the local rules of this Court concerning class actions. (Local

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[32] These quotations are from Defendant Wade's Exhibit No. 1, a Texas Monthly article — "What Do These Rugged Texas He-Men Have In Common?" — *which was admitted into evidence without objection*. 553 F.Supp. 1129 at n.14, 1149 at n.4.) See also "Task Force on Homosexuality." (553 F.Supp. 1129 at n.13.)

Rule 10.2, Northern District of Texas.) Instead, Hill merely asserts that he should be permitted to act as class representative since neither of the designated class representatives filed a notice of appeal — and since the State of Texas has dropped its appeal.

Hill has not shown that he is the real party in interest in this case. Indeed, he has not participated in it in any way — and is being represented by a Dallas attorney, Wm. Charles Bundren, who was an incorporator and an attorney for DDAA (see footnote 2). Under these circumstances (see footnote 8), there should be at least a minimal showing that it is Potter County or the Potter County District Attorney — and not DDAA or its attorneys — that is prosecuting these motions (and the attempt to retry this case).

In addition, this Court specifically finds that District Attorney Hill *would not* be an adequate representative for the defendant class which was certified. This finding is based upon the actions of Hill-Bundren-DDAA in connection with the present motions. In particular, Hill-Bundren-DDAA:

> (i) filed motions to reopen the evidence and to intervene which were, at first, not properly supported by any affidavits;
>
> (ii) later filed affidavits "supporting" one motion, but have never corrected the defect in the motion to intervene as class representative;
>
> (iii) asked this Court to set aside its judgment based upon "newly discovered" medical evidence which, in part, consists of articles from Time, Newsweek, and the Saturday Evening Post;
>
> (iv) made totally unfounded accusations that two highly qualified and credible witnesses — Dr. Simon and Dr. Marmor — committed fraud and made misrepresentations in their testimony at trial;

(v) relied upon a controversial "expert," Dr. Paul Cameron, who has made misrepresentations to this Court and whose cross-examination in any subsequent hearing could be detrimental to the best interests of the defendant class.

Accordingly, both the "Motion to Set Aside Final Judgment and Reopen the Evidence" and the "Motion to Intervene and Substitute Class Representative" are **DENIED.** However, the Court notes that it would consider permitting the intervention of Danny Hill as an individual defendant upon the filing of a properly supported motion showing that Potter County or the Potter County District Attorney — and not some private group — is the real party in interest.[33]

APPENDIX A

102 S. Ct. 2421, 2426 n.11 (1982) (emphasis added) *citing, Hughes Tool Company v. Transworld Air Lines, Inc.*, 409 U.S. 363, 366 n.1 (1973). If the denial of certiorari imports no implication or influence about the merits, how can it plausibly be argued that it represents a "doctrinal development." [*Nonsense.*] The overwhelming body of law clearly holds that a certiorari denied ruling by the Supreme Court expresses no opinion on the merits of the case. In fact, the cases are legion in holding that the Supreme Court expresses no opinion on the merits of a case when it denies a petition for writ of certiorari. *See generally* 12 MOORE'S FEDERAL PRACTICE

[33] The plaintiff is the "prevailing party" on the post-trial motions disposed of by this supplemental opinion, and is entitled to recover reasonable attorneys fees under 42 U.S.C. § 1988. These will be taxed against Danny Hill, District Attorney of Potter County, Texas, the named party on whose behalf the motions were filed. However, this Court's decision as to the amount of attorneys fees to be awarded will be reserved until the appeal in this case is concluded.

¶ 400.05-2 [4] and cases cited therein. Thus, *Onofre* does not represent a doctrinal development; it merely represents an expression of "no view." Because *Commonwealth's Attorney* was summarily affirmed, its legal precedent far outweighs the Court's "no view" expression in *Onofre*.

b. *Carey v. Population Services*, 431 U.S. 678 (1977)

The trial court's analysis of *Carey* is just as troubling. *Carey*, in the broadest sense of its terms, does not represent a "doctrinal development" to engage in private consensual homosexual conduct. In *Carey*, the Supreme Court held that a state may not regulate the distribution of contraceptives to minors. *Carey* did not concern the issue of whether there is a right of privacy to engage in consensual homosexual conduct. In fact, as the trial court noted, that proposition was . . .

APPENDIX B

Dallas Times Herald

Action Line 2
Weather 2

Metro

Sunday, August 15, 1982 . . .

Deadly illness hits homosexuals, puzzles doctors

By LINDA LITTLE
Staff Writer

A mysterious illness believed to be transmitted primarily through homosexual contact is hitting young men in epidemic proportions, making killers of infections and a rare cancer that usually are not fatal.

Researchers believe the condition weakens the body's defense against disease and makes victims susceptible to illnesses their bodies normally could overcome. The illness — diagnosed in 10 to 15 patients each week — already has become more deadly than toxic shock syndrome and Legionnaires' disease combined.

To date, the U.S. Centers for Disease Control in Atlanta said 519 cases have been reported in the United States, mostly among homosexual men. But the condition also is showing up in others with increasing frequency. About half the patients have died of a rare cancer called Kaposi's sarcoma, of an equally rare form of pneumonia or of viral infections that normally are not fatal.

Most of the victims — about 75 percent — are homosexual or bi-sexual males. A few are drug addicts. A small percentage fits neither category. Most of the cases have occurred in New York and California; Texas ranks fifth in the United States with 12 reported cases.

In Dallas, a 47-year-old man with the condition died after intensive chemotherapy failed to cure his Kaposi's sarcoma. Another area man with the illness is afflicted with lowered defenses against infection but has yet to suffer serious side effects.

"There is serious fear and panic, because the indications are that it is spread through sexual contact," said Bill Nelson, a spokesman for the Dallas Gay Alliance. "There is serious concern about it."

'There already have been more deaths than with toxic shock syndrome and Legionnaires' disease combined, and it may only be the tip of the iceberg.'

— Dr. Harry Haverkos of the U.S. Public Health Service

Federal public health officials are calling the condition the most pressing and serious public health concern this year. They are meeting with leaders of the National Gay Alliance in Dallas this weekend to discuss the problem and ways of combating it.

"There already have been more deaths than with toxic shock syndrome and Legionnaires' disease combined," said Dr. Harry Haverkos of the U.S. Public Health Service. "And it may only be the tip of the iceberg of the outbreak."

Officials at the CDC have given the epidemic top priority. More than 100 researches are attempting to find the cause, mode of transmission and a treatment for the mystifying condition, called acquired immune deficiency — AID for short.

It is an unprecedented phenomenon. Not only does it present the first epidemic of what appears to be a deficiency of the body's immune system to fight infection, but researchers say it may be unleashing the first epidemic of cancer in this country.

Although the spread of AID has not reached the proportions of the major flu epidemic, federal health officials are calling the number of cases an epidemic because of the sudden occurrence and the mystery concerning its cause and cure.

"This is a hell of a lot of people, especially when you consider that many will eventually die," said Dr. Frederick

Siegal of Mount Sinai Medical Center in New York. "They may not die of the first, second or third infection, but eventually one will come along and cause their death.

"It is a horrendous, terrible business. We stand there and treat the infections and try to figure out what to do next, but no one has come up with a medical treatment for the underlying deficiency."

Earlier this year, Siegal successfully treated a young man for a rare type of pneumonia. Now the patient is going blind from an eye infection.

Medical investigators have traced the condition back to 1978, but the illness first aroused doctors' suspicions in May 1980.

A 24-year-old man was referred to Siegal for treatment of viral infection. Despite intensive, normally effective treatment, the man "continued to waste away, literally withering away, dying of a heart attack," the doctor said.

Eight months later, two more young men were referred to Siegal at Mount Sinai with similar devastating infections. All three men were homosexual.

"It was then we realized something special was going on," Siegal said.

About the same time, doctors in California were puzzling over an unusually severe yeast infection in a young man, who then developed a rare form of pneumonia caused by the parasite Pneumocystis carinii.

Dr. Michael Gottlieb of the University of California School of Medicine in Los Angeles said only one case of this type of pneumonia had been reported previously in a normally healthy individual. The California doctors found a marked deficiency in the man's ability to fight infection, a medical rarity itself that usually only occurred in infants with genetic defects.

DALLAS TIMES HERALD
8—B Sunday, August 15, 1982

New Illness mainly hits homosexuals

NEW — From Page One

"He recovered from the pneumonia," Gottlieb said. "Then he experienced a wasting syndrome where he just failed to thrive and became emaciated."

The man, who also was homosexual, survived a second bout of pneumonia but developed the reddish-violet skin lesions typical of Kaposi's sarcoma. He died of the cancer within a year of his first visit to the doctors.

The cases continue to occur with increasing frequency. To date, of the 505 victims of AID, 212 have died. More than half have had pneumonia, a third had cancer and 51 had other serious illnesses.

Of the minority of cases occurring among women and in heterosexual men, a common characteristic is intravenous drug abuse. The illness also has occurred among a small number of Haitian immigrants, among whom neither homosexuality nor drug use was evident.

Findings from several studies support the theory that AID is transmitted sexually. A study conducted by the Los Angeles Health Department identified 19 homosexual men with Kaposi's sarcoma who also had lowered body immunity. Of the 13 interviewed, nine had had sexual contact with each other.

"This doesn't prove it, but it definitely suggests this may be sexually transmissible," Gottlieb said. "It exceeds what you would expect by chance alone.

"I am still seeing patients as a part of that cluster," he said. "Patients are still coming to me with AID who had contact with patients in that study."

In addition, a survey taken by federal health officials showed that homosexual men with AID had been more promiscuous and had contracted sexually transmitted disease more frequently than others studied.

More recently, the disease control centers have discovered AID in three people with hemophilia, suggesting that the condition might be transmitted through blood transfusions.

"It appears it can be spread through blood products." Siegal said. "And we have no way of telling which (blood products) are safe and which are not. In that respect, even if you stick to the straight and narrow — never taking drugs and having a monogamous heterosexual relationship — you still have some risk of contracting the disease.

Most of the patients have non-specific symptoms at first. There is a swelling of the lympth glands, weight loss, fever and diarrhea.

The most alarming thing about AID is that it appears to destroy the body's defense against disease.

The body's immune system acts as the army providing first-line defense against bacteria, viruses and conceivably some cancer.

"It seems to score a direct hit on the immune system, paralyzing it," Gottlieb said. "Patients go on to get serious infections, infections they normally wouldn't get if their immune systems were intact."

Gottlieb said the breakdown appears to be in the white blood cells, called the T lymphocytes, which attack viruses, fungi, parasitic infections and cancer.

"They (T lymphocytes) seem to sustain the bulk of the damage," he said.

Other researchers hypothesize that other parts of the body's defense system might be affected as well.

The breakdown in the natural defense system makes the patients more susceptible to viral infections and cancer, they say. Although researchers have been able to treat the illnesses that occur when the body's defense system is weakened, they are not able to correct the underlying immune deficiency.

"If you can't make the immune system work properly, then nothing else you do will be beneficial." Siegal said. "People can't survive in an environment that contains all these microorganisms."

A popular theory about the cause of AID is that a virus, maybe one as yet unknown, attacks the body's defense system, said Dr. James Curran of the CDC task force studying acquired immune deficiency.

Although several known viruses are suspect, Curran said, it is likely that the agent causing the deficiency is either a new, yet undescribed virus or a more virulent strain of a known virus.

"It's most likely something we have never heard of before," Siegal said.

Once the immune system is suppressed, the AID patients develop a variety of illnesses, from rare forms of cancer and pneumonia to viruses that normally are not nearly as devastating.

In addition, many clinics across the country are reporting an increasing number of homosexual men showing up with enlargement of lymph nodes throughout their bodies. Their immunity to disease appears low, and doctors fear the symptoms could represent the early stages of AID.

Officials attending the National Gay Leadership Conference in Dallas this weekend are hoping to make specific recommendations to help homosexuals reduce their chances of getting the condition.

Stanley Matek, president of the American Public Health Association, encouraged homosexuals to mobilize their "political muscle" to ensure financing for federal research about AID.

"Right now they are robbing Peter to pay Paul," he said. "Peter isn't rich enough in the first place. It's only a temporary device."

Matek said the CDC expects to spend $2 million on acquired immune deficiency research in 1982 and an additional $1.2 million next year, but no spending is planned for 1984.

APPENDIX E.

Donald F. BAKER, Plaintiff-Appellee,

v.

Henry WADE, District Attorney of Dallas County, Texas, Etc., et al., Defendants,
Danny E. Hill, 47th District Attorney, Defendant-Appellant.

No. 82-1590.

United States Court of Appeals,
Fifth Circuit.

Sept. 21, 1984.

Rehearing En Banc Granted
Jan. 28, 1985.

Appeal from the United States District Court for the Northern District of Texas

Before GOLDBERG, RUBIN and REAVLEY, Circuit Judges.

ALVIN B. RUBIN, Circuit Judge:

One who performs "deviate sexual intercourse" with another person of the same sex in Texas is guilty of a misdemeanor. A homosexual sued a class of all Texas district, county, and city attorneys, challenged the constitutionality of this statute, and the State, represented by Texas' Attorney General, intervened to defend the statute. After the district court, 553 F.Supp. 1121, held the statute unconstitutional as violating both the Texas and the United States constitutions,

the State and the original class representatives declined to appeal. One class member, a Texas county attorney, moved to intervene as of right to prosecute this appeal. A motions panel granted his motion to intervene. Having now had the benefit of full briefing, and having more fully considered the matter, we hold that the aspiring appellant did not have the right to intervene and that the Attorney General of Texas, who chose not to appeal, properly represented the interests of the State. We, therefore, dismiss the appeal.

I.

Donald F. Baker, a homosexual, sought a declaration that § 21.06 of the Texas Penal Code is unconstitutional. The statute, captioned "Homosexual Conduct," provides:

> A person commits an offense if he [or she] engages in deviate sexual intercourse with another individual of the same sex.

"Deviate sexual intercourse" is defined by statute, in pertinent part, as "any contact between any part of the genitals of one person and the mouth or anus of another person."[1] Violation of § 21.06 is a "Class C misdemeanor," punishable only by "a fine not to exceed $200."[2] Adopted in 1974 as part of the first comprehensive reform of the state's criminal laws,[3] the

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[1] Tex.Penal Code Ann. § 21.01 (Vernon 1974).

[2] Tex.Penal Code Ann. § 12.23 (Vernon 1974).

[3] In its opinion, the district court traced the history of Texas laws proscribing acts deemed sexually deviate. In 1860, Texas prohibited "the abominable and detestable crime against nature," and made it punishable by five to fifteen years imprisonment. This statute did not condemn oral sex, but proscribed only anal sex and bestiality. *See Pruett v. State*, 463 S.W.2d 191 (Tex. Crim.

statute proscribes both public[4] and private[5] homosexual conduct between consenting adults.

The complaint named as defendants Henry Wade, the District Attorney of Dallas County, and Lee Holt, City Attorney of Dallas, Texas; it also sought certification of a defendant class, under Fed.R.Civ.P. 23(b)(2), consisting of "all district, county and city attorneys in the State of Texas responsible for the enforcement of Texas Penal Code Ann. § 21.06." After the State of Texas, represented by its Attorney General, intervened, defendant Holt advised approximately forty district, county, and city attorneys that, if they wished to intervene, they should do so "well in advance of the class certification hearing." Neither Hill's predecessor in office, Thomas A. Curtis, District Attorney of Potter County, Texas, nor any of the other attorneys who received notice chose to intervene. The parties then agreed that the defendant class was proper, and

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App. 1971), appeal dismissed for want of substantial federal question, 402 U.S. 902, 91 S.Ct. 1379, 28 L.Ed.2d 643 (1971).

In 1943, the Texas legislature enacted a statute prohibiting "carnal copulation" with human or beast, condemning all oral and anal sex and bestiality. The offense was punishable by imprisonment for two to fifteen years. For the next thirty-one years, it was a felony for anyone in Texas — married or unmarried males or females, or homosexuals of either sex — to engage in oral or anal intercourse, in public or in private. This statute was held unconstitutional by a three-judge federal court, *Buchanan v. Batchelor*, 308 F.Supp. 729 (N.D.Tex. 1970), *vacated and remanded on other grounds sub nom., Wade v. Buchanan*, 401 U.S. 989, 91 S.Ct. 1221, 28 L.Ed.2d 526 (1971), but the Texas Court of Criminal Appeals declined to follow this decision and held that the statute was constitutional, *Pruett v. State*, 463 S.W.2d 191 (Tex. Crim. App. 1971).

[4] Insofar as § 21.06 condemns public homosexual conduct, it overlaps § 21.07 of the Texas Penal Code. This section, entitled "Public Lewdness," proscribes "an act of deviate sexual intercourse" as well as other sexual acts performed "knowingly . . . in a public place or, if not in a public place . . . [if the person is] reckless about whether another is present who will be offended or alarmed by his [or her] act . . . ."

[5] Section 21.06 is not limited to public conduct.

the court entered a consent certification order naming Holt and Wade as class representatives.

After a trial, the district court, in a comprehensive opinion, held § 21.06 unconstitutional as a violation of Baker's fundamental right of privacy and his right to equal protection of the law. The court enjoined the defendants from enforcing the statute. The State of Texas filed a notice of appeal and then withdrew it, and neither of the class representatives appealed. Thereafter, Danny Hill, who had become District Attorney of Potter County, filed both a motion to set aside the judgment and to reopen the evidence, and a motion to intervene and to substitute class representatives. The Dallas Doctors Against AIDS, which was neither a named defendant nor a class member, also sought to intervene. The district court denied all of these motions. Hill later filed a petition for writ of mandamus in the Supreme Court of Texas in order to compel the Attorney General to appeal the district court's decision, but his petition was denied. A panel of this court then granted Hill's motion to intervene on appeal.

In addition to asserting the constitutionality of the statute, Hill attacks Baker's standing to sue and the justiciability of his claim. Baker counters that Hill should not be heard because his intervention is improper under Fed.R.Civ.P. 24(a)(2). The threshold question is the propriety of Hill's intervention. The failure of Hill's efforts to intervene would leave us without an appellant and consequently without authority to consider any of the other issues. Although the motions panel granted Hill's motion to intervene, its ruling was made without the benefit of complete briefing and without opportunity to consider the relationship of the aspirant intervenor's interest to the substantive issues in the case. Its ruling, therefore, is perforce provisional and may be reconsidered by the oral argument panel to which the case is assigned after complete briefing. The court may then on occasion reach a different conclusion, and it is

free to follow the course chosen after receiving more complete information.[6]

II.

Hill sought to intervene under Fed.R.Civ.P. 24(a)(2). That provision bestows a right to intervene only if each of the following conditions is satisfied:

> (1) the application for intervention must be timely;
> (2) the applicant must have an interest relating to the property or transaction which is the subject of the action;
> (3) the applicant must be so situated that the disposition of the action may, as a practical matter, impair or impede his ability to protect that interest;
> (4) the applicant's interest must be inadequately represented by the existing parties to the suit.[7]

If the applicant for intervention fails to establish any one of these requirements, then he may not intervene of right.[8] Hill contends that his official capacity as District Attorney for Potter County, his membership in the defendant class, and the failure of the class representatives to appeal justify his intervention on the ground of inadequate representation. Although Baker disputes the timeliness of Hill's post-judgment attempt to intervene,[9] we need address that issue only if the other three require-

[6] *EEOC v. Neches Butane Products Co.*, 704 F.2d 144, 147 (5th Cir. 1983).

[7] *New Orleans Public Service, Inc. v. United Gas Pipe Line Co.*, 732 F.2d 452, 463 (5th Cir. 1984) (en banc) (quoting *International Tank Terminals, Ltd. v. M/V Acadia Forest*, 579 F.2d 964, 967 (5th Cir. 1978).

[8] *Bush v. Viterna*, 740 F.2d 350, at 354 (5th Cir. 1984); *International Tank Terminals, Ltd. v. M/V Acadia Forest*, 579 F.2d 964, 967 (5th Cir. 1978).

[9] An attempt to intervene only after judgment has been rendered does not of itself make the motion untimely. *See United Airlines, Inc. v. McDonald*, 432

ments for intervention of right are satisfied. Because the Attorney General of the State of Texas appeared on behalf of the State to defend the constitutionality of § 21.06, and the class representatives also asserted its constitutionality, we first focus on whether Hill has demonstrated the existence of a personal interest that has not been adequately represented by the existing parties.

Although the 1966 amendment to Rule 24(a) liberalized the requirements for intervention as of right, the burden of establishing inadequate representation, however slight, remains on the applicant for intervention.[10] Even though this burden is satisfied if the applicant makes a minimal showing that representation of his interest may be inadequate,[11] "it cannot be treated as so minimal as to write the requirement out of the rule."[12] Thus, in this circuit, as in others, representation is presumed adequate unless the applicant alleges that the representatives engaged in collusion, non-feasance, or had an interest antagonistic to his.[13] As we recently stated in *Bush v. Viterna*, "when the party seeking intervention has the same ultimate objective as a party to the suit, a presumption arises

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U.S. 385, 97 S.Ct. 2464, 2465, 53 L.Ed.2d 423 (1977). The timeliness of the motion must be evaluated under the standards enunciated by us in *Stallworth v. Monsanto Co.*, 558 F.2d 257, 264-66 (5th Cir. 1977).

[10] *See Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10, S.Ct. 630, 636 n.10, 30 L.Ed.2d 686, 694 n.10 (1972).

[11] *Id.*

[12] *Bush v. Viterna*, 740 F.2d 350, at 355 (5th Cir. 1984).

[13] *See, e.g., United States v. United States Steel Corp.*, 548 F.2d 1232, 1236 (5th Cir. 1977); *Ordinance Container Corp. v. Sperry Rand Corp.*, 478 F.2d 844, 845 (5th Cir. 1973); *United States Postal Service v. Brennan*, 579 F.2d 188, 191 (2d Cir. 1978); *Delaware Valley Citizens' Council for Clean Air v. Commonwealth of Pennsylvania*, 674 F.2d 970, 973 (3d Cir. 1982). *But see United States v. AT & T*, 642 F.2d 1285, 1293 (D.C. Cir. 1980) (burden is on opponent of intervention to show that representation is adequate); *cf.* 7A C. Wright & A. Miller, Federal Practice & Procedure § 1909, at 524 (1972).

that its interests are adequately represented, against which the petitioner must demonstrate adversity of interest, collusion, or nonfeasance."[14] A presumption of adequate representation also arises when the representative is a governmental body or officer charged by law with representing the interests of the absentee,[15] whether a citizen or a subdivision of the state seeks to intervene.[16]

To assess both whether the presumption of adequacy was justified in this case and whether the Attorney General in fact adequately represented Hill's interest, we examine the nature of Hill's interest[17] and the interest of the State as represented by the Attorney General.

As an applicant for intervention, Hill must assert "an interest relating to the property or transaction which is the subject of the action" in order to satisfy the requirement of Rule 24(a)(2). This circuit requires the asserted interest to be direct, substan-

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[14] *Bush v. Viterna*, 740 F.2d 350, at 355 (5th Cir. 1984) (quoting *International Tank Terminals, Ltd. v. M/V Acadia Forest*, 579 F.2d 964, 967 (5th Cir. 1978)).

[15] 7A C. Wright & A. Miller, Federal Practice and Procedure § 1909, at 525-29 (1972); *see also Sam Fox Publishing Co. v. United States*, 366 U.S. 683, 689, 81 S.Ct. 1309, 1312-13, 6 L.Ed.2d 604, 609 (1961) (dictum).

[16] *See Delaware Valley Citizens' Council for Clean Air v. Commonwealth of Pennsylvania*, 674 F.2d 970 (3d Cir. 1982) (denying intervention by state legislators when the state attorney general was a party); *Environmental Defense Fund, Inc. v. Higginson*, 631 F.2d 738 (D.C. Cir. 1979) (denying intervention by local water districts when state was already a party to the suit); *Commonwealth of Pennsylvania v. Rizzo*, 530 F.2d 501 (3d Cir.) (denying intervention by firemen and officers when the city was a party to the suit), *cert. denied sub. nom., Fire Officers Union v. Pennsylvania*, 426 U.S. 921, 96 S.Ct. 2628, 49 L.Ed.2d 375 (1976).

[17] *See Bush v. Viterna*, 740 F.2d 350, at 355 n.9 (5th Cir. 1984) (deciding sufficiency of interest for intervention is not required in order to determine adequacy of representation).

tial, and legally protectable[18] — "one which the *substantive* law requires as belonging to or being owned by the applicant."[19] Accordingly, the claim an applicant seeks intervention to assert must be one as to which he is the real party in interest under Fed.R.Civ.P. 17(a).[20] Hill's *standing* to participate,[21] and therefore the interest he may intervene to protect arises solely out of his official capacity as Potter County Attorney; the judgment binds him only in that role.[22] As a private person, he has no greater interest than any citizen of Texas, a private interest that would not support intervention. Hill's role as County Attorney, the duties of which are defined by *state law*,[23] circumscribes his official interest in this case.

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[18] *New Orleans Public Service, Inc. v. United Gas Pipeline Co.*, 732 F.2d 452, 463 (5th Cir. 1984) (en banc); *Diz v. Southern Drilling Corp.*, 427 F.2d 1118, 1124 (5th Cir.), *cert. denied sub nom., Trefina A-G v. United States*, 400 U.S. 878, 91 S.Ct. 118, 27 L.Ed.2d 115 (1970); *United States v. Perry County Board of Education*, 567 F.2d 277, 279 (5th Cir. 1978).

[19] *New Orleans Public Service, Inc.*, 732 F.2d at 464 (emphasis in original).

[20] *Id.*; *Piambino v. Baily*, 610 F.2d 1306, 1321 (5th Cir.), *cert. denied sub nom., Piambino v. Sylva*, 449 U.S. 1011, 101 S.Ct. 568, 66 L.Ed.2d 469 (1980).

[21] Hill is bound by his oath of office to enforce the State's laws. He is also subject to a contempt citation should he violate the district court's mandate. These two factors are sufficient to confer article III standing. *Compare Board of Education v. Allen*, 392 U.S. 236, 242 n.5, 88 S.Ct. 1923, 1925 n.5, 20 L.Ed.2d 1060, 1064 n.5 (1968), *with Finch v. Mississippi State Medical Ass'n*, 585 F.2d 765, 773-74 (5th Cir. 1978). The oath of office and the threat of a contempt citation, however, also show that the extent of Hill's, as opposed to any other citizen's, stake in this controversy is circumscribed by his official capacity as District Attorney for Potter County.

[22] The judgment on its terms reaches only the named defendants and "the members of the class certified."

[23] *See Piambino v. Bailey*, 610 F.2d at 1321; *United States v. 936.71 Acres of Land*, 418 F.2d 551, 556 (5th Cir. 1969); *cf. Smuck v. Hobson*, 408 F.2d 175, 177-78 (D.C. Cir. 1969) (en banc) (resignation of superintendent eliminated cognizable interest necessary to intervene to appeal desegregation order).

In this attack on the facial unconstitutionality of a statute adopted by the state legislature and signed by the state governor, the state as a sovereign body politic was the real party in interest. The Texas Constitution provides that the Attorney General "shall represent the state in all suits and pleas in the Supreme Court of the State in which the State may be a party . . . and perform such other duties as may be required by law."[24] And Texas law mandates that "the Attorney General shall prosecute and defend all actions in the Supreme Court or the Courts of Civil Appeals in which the State may be interested."[25] In declaratory judgment actions challenging the constitutionality of a "statute, ordinance, or franchise . . . the Attorney General of the State shall also be served with a copy of the proceeding and be entitled to be heard."[26] Texas law thus plainly designates the Attorney General as the official responsible for protecting the State's interest in litigation.[27]

The laws of Texas vest in district and county attorneys the exclusive responsibility and control of criminal prosecutions and certain other types of proceedings.[28] We do not, however, have before us any issue concerning who is the proper representative of the state in a proceeding of that nature. The Texas Supreme Court has explained that the constitutional provisions governing the office of the Attorney General entrust important

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[24] Texas Const. art. 4, § 22.

[25] Tex.Rev.Civ.Stat.Ann. art. 4395 (Vernon 1976).

[26] Tex.Rev.Civ.Stat.Ann. art. 2524-1 § 11 (Vernon 1965).

[27] See *Charles Scribner's Sons v. Marrs*, 114 Tex. 11, 262 S.W. 722 (1924); *see also Bullock v. Texas Skating Ass'n*, 583 S.W.2d 888, 894 (Tex.Civ.App. — Austin, 1979, writ ref'd n.r.e.) (noting Attorney General's discretion "to decide whether to appeal a case in which the state had experienced an adverse judgment in the trial court.").

[28] *See* Texas Const. art. 5, § 21; C.C.P. art. 2.01; *State v. Gary*, 163 Tex. 565, 359 S.W.2d 456, 458 (1962); *Shepperd v. Alaniz*, 303 S.W.2d 846 (Tex. Civ.App. 1957, no writ).

matters of statewide interest to that statewide officer.[29] The issue raised by this case is certainly of statewide interest; it presents only the question of the constitutional validity or invalidity of a state law, determined solely on the face of that law and not as applied to any specific situation.

Our conclusion that the state's attorney general is presumptively an adequate representative of the state's interest takes further support from various federal provisions requiring notice to that official. For example, in federal court proceedings drawing into question the constitutionality of a state statute, the court must notify the state's attorney general and afford the state an opportunity to intervene on the constitutional issues.[30] In addition, the provisions governing federal habeas corpus contemplate notice to the attorney general of the state having custody of the prisoner.[31] This same reasoning led us to conclude that a state attorney general has the power to waive the requirement that a state prisoner exhaust his state remedies before seeking federal habeas corpus relief.[32]

This case does not require us to decide whether the Attorney General must be the exclusive representative of the state's interest nor does it require us to determine the issues that might be presented by an attack on the constitutionality of a statute as applied. Rather, we face the question whether intervention by a state's attorney is called for once the Attorney General has intervened to represent the interests of the state. The State as a sovereign then speaks in court with a single voice; litigation would be unmanageable were it possible for every district,

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[29] *Brady v. Brooks*, 99 Tex. 366, 89 S.W. 1052, 1056-57 (1905). *Brady's* continuing vitality was noted in *Magnolia Petroleum Co. v. State*, 190 S.W.2d 581, 586 (Tex.Civ.App. 1945, no writ).

[30] 28 U.S.C. § 2403(b).

[31] *See* 28 U.S.C. § 2252; 28 U.S.C. fol. § 2254, Rules 2(a), 4. *See also* 28 U.S.C. fol. § 2254, appendix of forms.

[32] *McGee v. Estelle*, 722 F.2d 1206, 1212 (5th Cir. 1984) (en banc).

county, or city attorney who differs with the State' position, as voiced by the Attorney General, to intervene in order to assert the unconstitutionality of a state statute the Attorney General seeks to defend or the constitutionality of a statute whose declared unconstitutionality he is willing to allow to remain unchallenged, each asserting perhaps not only a different position but a different legal theory supported by different evidence. The protraction of any such litigation might expose the State to legal fees and expenses of massive size if the opponent prevailed.[33]

The presumption of adequate representation is, therefore, warranted. Moreover, the representation was adequate in fact. The case was vigorously defended. Such interests as Hill had in defending the constitutionality of the statute were asserted both by the class representatives and the Attorney General, as intervenor. Indeed, their ultimate objective was precisely the same. Hill charges no collusion, non-feasance or interest antagonistic to his. Instead, he confines his allegations of inadequate representation to the named defendants' failure to appeal. Hill's argument on the merits is largely an attempt to shed what he alleges is new light on the constitutional issues, in the form of various affidavits and literature concerning sexually transmitted diseases. He failed to convince the district court that much of that evidence was newly discovered for the purposes of Fed.R.Civ.P. 60(b). Any attempt now to argue that the named defendants were derelict in failing to present it might be met with the answer that his intervention on that basis is untimely.[34]

Hill alleges no facts that would indicate that the decision not to appeal was based on collusion or that it represents any-

[33] *See, e.g.*, 42 U.S.C. § 1988.

[34] *See Stallworth v. Monsanto Co.*, 558 F.2d 257, 264-66 (5th Cir. 1977); *Jones v. Caddo Parish School Board*, 735 F.2d 923, 933-34 (5th Cir. 1984) (en banc).

thing other than a sound strategic assessment of the case's strengths and weaknesses. Indeed, because the constitutionality of the statute was defended not only by the class representatives but by the State of Texas through its Attorney General, a would-be intervenor must make a "very strong showing of inadequate representation" before he can prevail.[35]

Hill was content to rely on the efforts of others until the cause was lost and those who had hitherto fought the battle considered further litigation undesirable. He makes a desultory allegation that he was not given adequate notice of the pendency of the case, but the record shows that notice of the action was sent to each class member, including Hill's predecessor. Moreover, given the publicity attending this litigation, some of which appears in the record, it it extremely unlikely that a person in Hill's position was ignorant of important developments in the proceeding. "Notice would [have] add[ed] little or nothing."[36]

Hill relies on our decision in *Gonzales v. Cassidy*,[37] for the proposition that the named defendants' failure to appeal per se demonstrates their failure to guard the interests of the members of the class. Although that opinion contains dicta that may be read to support the view Hill espouses, the facts distinguish *Gonzales*. There the class representative simply deserted the class members whom he had the duty to protect. *Gonzales* was the culmination of a series of cases and appeals that resulted in a declaration that the state uninsured motorist

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[35] 7A C. Wright & A. Miller, Federal Practice and Procedure § 1909, at 530-31; *see also* cases cited *supra* note 16; *cf. Associated Indus. of Alabama, Inc. v. Train*, 543 F.2d 1159 (5th Cir. 1976) (attempted intervention by state's attorney general in action conducted by Environmental Protection Agency administrator).

[36] 3B J. Moore & J. Kennedy, Federal Practice ¶ 23.55, at 23-441 (2d ed. 1972).

[37] 474 F.2d 67 (5th Cir. 1973).

law was unconstitutional, but only as applied to the single class representative. The representative won retroactive relief; but prospective as well as retroactive relief were denied to all other class members. The representative, acting only in his own interest and disregarding the class issues, took his judgment and went home. Once the representative secured his judgment, his interest and that of the class diverged. We held that, because the representative had not adequately advanced the interests of the entire class, the judgment was not res judicata as to them. In the present case, intervention by the State provided advocacy of the State's interests and consequently Hill's official interest as prosecutor for the State. Hill makes no allegation that the representatives' interests diverged from his.

This is not a case in which the government's interests conflicted with those of an individual who asserts only his personal stake.[38] The Texas Attorney General has decided that the sovereign interests of the State are served by foregoing an appeal in ths case. It should be neither Hill's province nor ours to question that judgment. As we have previously observed, "The Texas courts have held that the Constitution vests authority to enforce the rights of the state exclusively in the state's attorneys."[39]

III.

Defendant class actions embody a potential for unfairness to absent class members because the *plaintiff* makes an initial

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[38] *See, e.g., Trbovich v. United Mine Workers*, 404 U.S. 528, 538-40, 92 S.Ct. 630, 636-37, 30 L.Ed. 686, 694-96, (1972) (allowing intervention by union member to protect his interest because the Secretary of Labor protects rights of union members and the interests of the public in democratic elections).

[39] *McGee v. Estelle*, 722 F.2d 1206, 1212 n.18 (5th Cir. 1984) (en banc).

choice of class representative.[40] Here, however, there is question of neither the competency nor the adequacy of these representatives and, more important, the true interest at stake, that of the State of Texas in the constitutionality of its duly enacted legislation, was defended by the State's own spokesman and chief legal officer. Because Hill has failed to allege any facts that impugn either the Attorney General's or the class representatives' discharge of that responsibility, apart from their decision not to appeal, we DISMISS Hill's petition.

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[40] "[I]t is a strange situation where one side picks out the generals for the enemy's army." Z. Chafee, Some Problems of Equity 237 (1950); *see generally* Note, Certification of Defendant Classes Under Rule 23(b)(2), 84 Colum.L.Rev. 1371, 1387 (1984).

APPENDIX F.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 82-1590

DONALD F. BAKER,

Plaintiff-Appellee,

versus

HENRY WADE, District Attorney
of Dallas County, Texas, Etc.,
ET AL.,

Defendants,

DANNY E. HILL, 47th
District Attorney,

Defendant-Appellant.

Appeal from the United States District Court for
the Northern District of Texas

(October 23, 1985)
(Opinion August 26, 1985, 5th Cir. 1982, 769 F.2d 289)

ON PETITION FOR REHEARING EN BANC

Before CLARK, Chief Judge, GOLDBERG, GEE, RUBIN, REAVLEY, POLITZ, RANDALL, TATE, JOHNSON, WILLIAMS, GARWOOD, JOLLY, HIGGINBOTHAM, DAVIS, HILL and JONES, Circuit Judges.*

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* Judge Goldberg, now a senior judge of this circuit, is participating as a member of the panel initially deciding the appeal. 28 U.S.C. § 46(c) ('1982).

REAVLEY, Circuit Judge:

By the opinion at 769 F.2d 289 this court held that Danny E. Hill was entitled to intervene and pursue the appeal and, on the merits, declined to invalidate the Texas penal statute that proscribes "deviate sexual intercourse with another individual of the same sex." Nine of the sixteen participating judges joined in that decision. Seven judges dissented on the procedural ground that Hill was not entitled to intervene and prosecute the appeal. Only one dissenting judge wrote further to say that if he were to reach the merits he would hold the Texas statute unconstitutional.

In appellee's petition for rehearing, written with some feeling, we are charged with having thrown out all of the traditional rules "to continue to criminalize more than a half million Texans." This is so, as appellee sees it, because the record in this particular case does not support a finding of moral justification for the statute or a finding that in its enactment the Texas legislature was motivated by considerations of morality. We are charged with having overlooked the findings of the trial court, including the finding that there is no rational relation between the statutory prohibition and a legitimate state interest. Appellee further argues that if morality was actually the purpose of the state in enacting this statute, the burden was upon the state to justify the statute on those moral grounds. Therefore, it is said, this court must "deal squarely with the issue of why homosexual conduct is being deemed to be immoral." Appellee's position is that this court is the arbiter of the rationality of the moral judgment of the people of Texas and their lawmakers, and that we cannot accept the actuality of that moral judgment of the Texas public as a rational basis for the statute.

While we are sensitive and sympathetic to some of the complaints of the appellee, it is simply not the business of this

court to act upon them. The appeal put forth in the petition, however sincere and deserving of response, is directed to the wrong audience. It is not the role or authority of this federal court to decide the morality of sexual conduct for the people of the state of Texas. And we suggest that the proper understanding of our constitutional authority is even more important to the republic than is this particular moral issue.

The finding of the district court, to the effect that no rational basis exists for prohibiting this manner of sexual conduct, is a legislative finding and not an adjudicative fact finding. See *Dunagin v. City of Oxford, Miss.*, 718 F.2d 738, 748-49 n.8 (5th Cir. 1983). We see ourselves bound by the decision of the lawmakers of Texas and not by the "finding" of a federal district judge. The process by which Texas enacted the statute is not attacked. The statute deprives no one of a constitutional right. It may be that the Supreme Court of the United States will hold that a right of privacy exists for this sexual conduct, but that is not the direction given by *Doe v. Commonwealth's Attorney*, 425 U.S. 901, 96 S.Ct. 1489, 47 L.Ed.2d 751 (1976), *aff'g* 403 F.Supp. 1199 (E.D.Va. 1975) (three-judge court), and until the Supreme Court tells us to the contrary, we will follow their authority as it now stands.

As for the Equal Protection argument (that homosexual persons are denied equal treatment of the law), aside from the consideration that the Supreme Court declined to accept the contention in *Doe*, we must reject it. The statute is directed at certain conduct, not at a class of people. Though the conduct be the desire of the bisexually or homosexually inclined, there is no necessity that they engage in it. The statute affects only those who choose to act in the manner proscribed. If, as argued, the existence of the statute is a symbolic stigma against homosexually active persons, the stigma is due to the decision of the body politic of Texas that the proscribed conduct is morally wrong. Whatever may be one's personal opinion on

that question, no one can deny the magnitude of the contenders and literature on either side or deny the traditional resolution of the matter in our society. Under those circumstances we believe a federal court should refuse to become the arbiter.

Moral issues should be resolved by the people, and the laws pertaining thereto should be written or rescinded by the representatives of the people. Were a federal court to decree that the United States Constitution decides the issue and override the opinion of those of the different view, the natural course of the public debate and the developing consensus would be misshapen. The feelings of the losers, perhaps still in the majority, could be elevated by the nature of the fiat, and their frustrations might be vented upon the winners to a degree that increased the burdens of the latter beyond the consequences endured under the invalidated statute. Furthermore, the courts could be the biggest losers due to the reaction of the members of the public who regard the court's decision as morally wrong and who see the wisdom on moral issues as properly, and better, residing in the public forums and representative assemblies rather than in the federal judiciary.

Appellee's petition for rehearing is DENIED. The mandate shall now issue.

RANDALL, Circuit Judge, would deny petition without comment.

GOLDBERG, RUBIN, POLITZ, TATE, JOHNSON, and WILLIAMS, Circuit Judges, dissent from the denial of rehearing.

Appendix G.

28 U.S.C. § 2403. Intervention by United States or a State; constitutional question

(b) In any action, suit, or proceeding in a court of the United States to which a State or any agency, officer, or employee thereof is not a party, wherein the constitutionality of any statute of that State affecting the public interest is drawn in question, the court shall certify such fact to the attorney general of the State, and shall permit the State to intervene for presentation of evidence, if evidence is otherwise admissible in the case, and for argument on the question of constitutionality. The State shall, subject to the applicable provisions of law, have all the rights of a party and be subject to all liabilities of a party as to court costs to the extent necessary for a proper presentation of the facts and law relating to the question of constitutionality.

Supreme Court, U.S.
FILED
MAR 28 1986
JOSEPH F. SPANIOL, JR.
CLERK

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No. 85-1225

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

DONALD F. BAKER,

Petitioner,

v.

HENRY WADE, *et al.*,
and
DANNY E. HILL, 47TH DISTRICT ATTORNEY OF TEXAS, IN HIS OFFICIAL CAPACITY AS A DISTRICT ATTORNEY IN THE STATE OF TEXAS AND AS CLASS REPRESENTATIVE OF THE DEFENDANT CLASS OF ALL CITY, COUNTY AND DISTRICT ATTORNEYS IN THE STATE OF TEXAS, AND THE DEFENDANT CLASS,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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March 26, 1986

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QUESTIONS PRESENTED*

1. Whether Petitioner has standing to bring this action and whether a case or controversy exists that would give this Court jurisdiction over this matter?

2. Whether Hill, not the Attorney General, was the proper party to carry forward the appeal in this cause?

3. Whether the Fifth Circuit correctly held that this Court's summary affirmance in *Doe v. Commonwealth's Attorney* binds the lower courts in this case?

4. Whether the Fifth Circuit correctly analyzed Petitioner's equal protection claim in light of the legitimate and compelling state interests of morality, health and safety?

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* In accordance with S.Ct. Rules 22.1 and 34.1(b), Hill certifies that all parties to the Fifth Circuit judgment sought to be reviewed are: Donald F. Baker, Appellee, and Danny E. Hill, 47th District Attorney of Texas, in his official capacity as a member of the Defendant-Class, and as the Class Representative of the Defendant-Class, and the Defendant-Class, all of whom will hereinafter be referred to simply as "Hill", Appellants below. The State of Texas informally sought leave to intervene or appear as an *amicus curiae* after previously withdrawing the State's appeal, but formal action was never taken by the Fifth Circuit on the State's request. The Texas Attorney General has assumed that the State was an intervenor before the Fifth Circuit. Neither the State of Texas nor the Texas Attorney General was a legitimate party before the Fifth Circuit Court of Appeals.

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DANNY E. HILL, 47TH DISTRICT ATTORNEY OF TEXAS, IN HIS OFFICIAL CAPACITY AS A DISTRICT ATTORNEY IN THE STATE OF TEXAS AND AS CLASS REPRESENTATIVE OF THE DEFENDANT CLASS OF ALL CITY, COUNTY AND DISTRICT ATTORNEYS IN THE STATE OF TEXAS, AND THE DEFENDANT CLASS,

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BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

OPINIONS BELOW

The opinions below are discussed in Hill's Cross-Petition for Writ of Certiorari against the State of Texas, No. 85-1412, at 1-2 and Hill's Cross-Petition for Writ of Certiorari against Donald F. Baker, No. 85-1512, at 1-2.[1]

[1] There are two Petitions for Writ of Certiorari pending before the Court with respect to the Fifth Circuit's *en banc* decisions reported at 769 F.2d 289 and 774 F.2d 1285. Action No. 85-1251 was filed by the State of Texas against Danny E. Hill (hereinafter referred to as the "State Petition"). A similar and companion Petition for Writ of Certiorari was filed by the Plaintiff, Donald F. Baker, against Henry Wade, et al. and is referenced as No. 85-1225 (hereinafter referred to as "Baker Petition"). Hill filed a Cross-Petition against the State of Texas, No. 85-1412, and a separate Cross-Petition against Donald F. Baker, No. 85-1512. References to Hill's Cross-Petitions shall refer to the Court's docket numbers for the respective Petitions.

(Footnote continued on next page)

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit, sitting *en banc*, was entered on August 26, 1985. A Petition for Rehearing *en banc* was denied on October 25, 1985. Baker invoked the jurisdiction of this Court under 28 U.S.C. §1254(1), but Hill denies that this Court has jurisdiction in two respects. First, as to Baker, he lacks standing to prosecute the present action (as explained fully below); consequently, this Court has no subject matter jurisdiction. Second, as to the State in No. 85-1251, it was at most an *amicus curiae* in the circuit court below, and an *amicus* cannot invoke jurisdiction of this Court under 28 U.S.C. §1254(1) (as detailed fully below). Moreover, the State has refused to take a position on the constitutionality of the state statute challenged in this case; thus, there is no Article III case or controversy in this cause and so no jurisdiction in this Court over either the State's or Baker's Petition. Accordingly, both Petitions should be denied.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

A. Constitutional Provisions

Texas Constitution art. V, §21 is reproduced at Hill App. 11.

Texas Constitution art. XVI, §1 reads as follows:

> Members of the Legislature, and all other elected officials . . . shall take the following Oath or Affirmation: I, , do solemnly swear (or affirm), that I will faithfully execute the duties of the office . . . and will to the best of my ability preserve, protect, and defend the Constitution and laws of the United States and of this State . . . ."

(Footnote continued from previous page)

For the convenience of the Court and parties, references to the "Baker App." refer to the appendix to Petition for Writ of Certiorari in No. 85-1225, and references to the "Hill App." refer to the appendix to Cross-Petition for Writ of Certiorari in No. 85-1412. The Petitioner in No. 85-1251, the State of Texas, shall hereinafter be referred to simply as the "State." The Plaintiff and Appellee below who is the Petitioner in No. 85-1225, Donald F. Baker, shall hereinafter be referred to simply as "Baker."

B. Statutes

28 U.S.C. §2403(b) is reproduced at Hill App. 10.

Texas Penal Code §§21.01 and 21.06 are reproduced at Hill App. 8 and 9 respectively.

STATEMENT OF THE CASE

A full and complete statement of the case is included in Hill's Cross-Petitions, No. 85-1412 at 3-10 and No. 85-1512 at 2-9.

Baker has made the following misstatements of the facts of the case.

1. Baker's assertion that the district court conducted "further hearings" with respect to Hill's motion to intervene and be substituted as the class representative at the district court level (Baker Petition at 6 n.11, and 8 n.17) is erroneous. The district court denied Hill's motion to intervene and be named class representative without holding any hearings whatsoever on the motion. The district court's decision, which was released more than a year after the motions were filed and only a few weeks prior to the oral argument, was moot by the time the district court ruled because the Fifth Circuit had already granted Hill's motion to intervene and be substituted as the class representative on appeal.

2. Baker asserts that he did not seek injunctive relief against Hill or the defendant-class (Baker Petition at 4 n.4). This assertion is false. In Baker's pre-trial order, Baker sought "injunctive relief." (R. Vol. II at 338). The significance of Baker's failure to seek injunctive relief in his original complaint is that the defendant-class members were never given notice of Baker's request for injunctive relief since he did not seek such relief until after the class members were notified of the pendency of the suit. The defendant-class was never given notice of the contentions, issues and requests for relief in the pre-trial order prior to the entry of judgment.

3. Baker erroneously asserts that the Texas Attorney General "proceeded to defend Section 21.06 on the merits . . . while Wade and Holt represented, . . . a defendant class . . . ." (Baker's Petition at 4). Baker here implies that the Attorney General took an active role in defending the constitutionality of

§21.06. In fact, that assertion is false. The record clearly shows that the Attorney General did nothing more than file a four-page "response" on behalf of the State of Texas. He did not participate in the trial in an active manner and did not participate in the drafting and composition of the pre-trial order.

It is interesting that Baker admits in this section of his Petition that Wade and Holt were representing a clearly distinguishable party from the State. Baker admits that the defendant-class is a clearly distinct party from the State; however, throughout Baker's Petition he attempts to confuse the Court by stating that Hill is attempting to be substituted as the attorney for the State. Hill stands in the shoes of Wade and Holt, not the Attorney General or the State. Consequently, by Baker's own admission, Hill's substitution for Wade and Holt as the class representative clearly gives Hill standing to appeal. Baker reaffirms the distinction between the class representatives as a party and the State in Baker's Petition at 6 wherein he distinguishes the defendant-class representatives' decision not to appeal from the decision of Hill and the State to file notices of appeal.

4. Baker misleads the Court by implying that the post-judgment opinions of the district court with respect to Hill's motions to intervene and be substituted as class representative are final. (Baker's Petition at 7 n.15). The supplemental rulings of the district court are not final. A Notice of Appeal was filed by Hill with respect to the district court's erroneous decisions; however, due to the *en banc* court's decision that the failure to appeal was inadequate representation as a matter of law, it was not necessary for the Fifth Circuit to review and reverse the district court's opinions on the motions to intervene and be substituted.

5. Baker misleads the Court by implying that the *en banc* Fifth Circuit held that Hill had standing to represent the interests of the State. A fair reading of the Fifth Circuit's opinion shows that Hill was intervening as a member of the defendant-class sued by Baker and as the substituted class representative on appeal. Baker twists the words of the *en banc* court in order to mislead this Court into inferring that Hill purports to represent the interests of the State. He does not. He

represents his interests as a class member and the interests of the defendant-class chosen by Baker.

It is an interesting phenomenon of law when Baker can choose the defendant-class; choose the generals to lead the defendant-class; take a judgment including an injunction against the defendant-class; persuade the defendant-class representatives not to appeal; negotiate a settlement with co-counsel for one of the defendants (the State); leave the injunction against the individual defendant-class members intact; and, then argue that the defendant-class members and the substituted class representative on appeal do not have standing to appeal. This is the essence of Baker's position in his Petition. Do not the defendant-class members have a right to representation on appeal when they have been sued by Baker and involuntarily made parties to a federal court action? Do not the class members have a right to appeal when an adverse judgment is entered against them and their class representatives fail to appeal? Baker hopes that this Court will be misled by his shading, and sometimes blatant, misstatements of the facts. The only real question with respect to Hill's standing to appeal is whether a party that has been sued has a right to defend himself on appeal. Baker asserts that a party does not have a right to appeal. There are no unique legal issues presented by Baker's Petition. The uniqueness, if any, is the manner in which Baker continues to misstate the facts. Baker's confusion must not deter the Court from denying Baker's Petition because no true significant legal issues exist.

REASONS FOR DENYING THE WRIT

I.

BAKER HAS NO STANDING TO PROSECUTE THE PRESENT ACTION

Baker has neither alleged nor proven any actual injury which is sufficient to give him standing for purposes of prosecuting this suit. Hill has filed a Cross-Petition to this Court with respect to the Fifth Circuit's erroneous conclusion that Baker had standing to prosecute the present action. In the interests of brevity, Hill refers the Court to Section I of Hill's Cross-Petition, No. 85-1512 at 9—14.

This case is additionally distinguishable from *Hardwick v. Bowers,* 760 F.2d 1202 (11th Cir. 1985), *cert. granted sub nom. Bowers v. Hardwick,* 106 S. Ct. 342 (1985), No. 85-140, and *Dronenburg v. Zech,* 741 F.2d 1388 (D.C. Cir. 1984). In *Hardwick* the homosexual plaintiff was actually arrested, charged, and threatened with specific prosecution for particular acts he had committed. In *Dronenburg,* the Navy took direct action against the homosexual plaintiff. Thus, in both *Hardwick* and *Dronenburg* the homosexual plaintiffs were clearly affected by the statute and regulations which they challenged. Baker has no particular facts to bring to this Court with respect to his homosexual activities. Should the Court decide to grant Baker's Petition, Hill urges the Court to review and reverse the Fifth Circuit's holding that Baker had standing to prosecute the present action.

II.

HILL, NOT THE ATTORNEY GENERAL, WAS THE PROPER PARTY TO CARRY FORWARD THE APPEAL IN THIS CASE

A. This Issue Involves Merely a Matter of Texas Law Regarding Which State Officers May Represent Themselves in Federal Court And Is Not a Proper Subject for Supreme Court Review.

Baker (Baker Petition at 11) argues that the question of whether Hill or the Attorney General may carry forward the appeal in this case is a highly significant issue requiring this Court's attention. To the contrary, this issue involves merely a matter of Texas state law regarding which state officers may represent themselves in a federal forum. While Hill agrees that the Fifth Circuit determined this issue correctly in his favor, Hill suggests that this purely state-law issue is not a proper subject for Supreme Court review.

This Court has frequently held that a petitioner's challenge to state-law determinations made by a United States circuit court will rarely constitute an appropriate subject of Supreme Court review.[2] Recently, this Court announced that: "The

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2. *Haring v. Prosise,* 462 U.S. 306, 103 S. Ct. 2368, 2373 n.8 (1982). *See also Bishop v. Wood,* 426 U.S. 341, 346 (1976) (The Court normally accepts

(Footnote continued on next page)

allocation of authority among state officers to represent the state before this Court is . . . wholly a matter of state concern." *New York v. Uplinger,* 467 U.S. 246, 104 S.Ct. 2332, 2333 n.1 (1984). This Court has also expressly declared that among the grounds for the Court to deny certiorari is the fact that the decision below may be supportable as a matter of state law. *Maryland v. Baltimore Radio Show,* 338 U.S. 912 (1950). Texas law supports Hill's standing in the instant cause to carry forward his appeal, and Baker's challenge to this state law determination by the Fifth Circuit should not constitute an appropriate topic for this Court's consideration.

B. Hill And The Defendant-Class Of All City, County, And District Attorneys Are The True Defendants, Not The Attorney General Or The State.

1. Baker Sued Hill And The Defendant-Class, Not The State, The Attorney General Or The Governor.

Despite Baker's attempts to obfuscate the substance of this case (Baker Petition at 11—12), it was Baker who chose the defendants. He sued Hill and the defendant-class of all city, county, and district attorneys in Texas. He did not choose to sue the State, the Attorney General, or the Governor. Baker certified the defendants as a Rule 23(b)(2) class from which Hill could not opt out, and Baker obtained injunctive relief against the entire class, including Hill. Now, with the benefit of hindsight of seven years of litigation, Baker attempts to claim that he would have sued the State itself, but for the Eleventh Amendment. Baker further admits that he "could have sued the Texas Attorney General for declaratory relief" (Baker Petition at 12), but he neglected to do so allegedly because the Attorney General does not actively enforce Texas laws.

These excuses are simply inadequate, after-the-fact attempts to relieve Baker of his own choice of forum, defendants, and action. Baker chose to sue the specific class that he named, according to his counsel, James Barber, at *en banc* oral argument, so that he could obtain an injunction against all law enforcement attorneys in the State to prohibit them from enforcing §21.06. Such a decision represents a considered, studied choice, not an oversight on the part of Baker or his

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(Footnote continued from previous page)
any reasonable construction of state law by the Court of Appeals, even if a separate examination of state law might justify a different conclusion).

counsel.[3] If Baker had wanted the Texas Attorney General to be the sole representative for the defendant-class, Baker should have sued the Attorney General. Baker chose his opposition to be the defendant-class, but now he wants a party that he did not sue to be the exclusive spokesman for the defendants. In essence, Baker is looking to this Court to extricate him from the predicament of federal class-action jurisprudence into which he has purposely gotten himself. This Court should decline Baker's invitation.

2. Baker Has Waived Any Objection To Hill's Standing And Any Argument That The State Or The Attorney General is the True Party in Interest.

Baker's claim that the State is "the real party in interest in this case" (Baker Petition at 11) confuses the concepts of "real party in interest" and "capacity to be sued." In addition, Baker has waived any right to make this claim and so challenge the capacity of Hill as a true defendant under Federal Rules of Civil Procedure 9 and 17. The authorities on this issue have been explained fully in Section II.E of the argument in Hill's Cross-Petition against Baker (No. 85-1512), and for brevity's sake, the Court is respectfully referred to that section. Baker is now estopped to raise any such challenge against Hill.

3. If Hill Can Be A True Party For 42 U.S.C. §1988 Purposes, Hill Is The True Party Defendent As Well.

Contrary to Baker's present protestations regarding potential attorneys fees being awarded against the State in this cause (Baker Petition at 14), Baker's counsel, James Barber, in answer to a specific question from the *en banc* panel at the Fifth Circuit oral argument, admitted and affirmed that he and his client would seek their attorneys fees in this case against Hill and his jurisdiction, Potter and Armstrong Counties, not against

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3. Other homosexuals challenging other states' sodomy statutes appear to have decided to use other procedural methods to sue. For example, in *Ward, et al. v. Connick, et al.*, Civil Action No. CA 84-5735-§C (E.D. La.), a case filed on December 3, 1984, in the federal district court in New Orleans, Louisiana, the homosexual plaintiffs challenging the Louisiana sodomy statutes have named as defendants only the Louisiana Attorney General, William J. Guste, Jr., the Louisiana Governor, and the New Orleans District Attorney.

the State.[4] Furthermore, the district judge in this case has already indicated in no uncertain terms that if Hill does not prevail in this appeal, the district court will award Baker's attorneys fees against Hill and Potter County, not against the State. *Baker v. Wade,* 106 F.R.D. 526 (N.D. Tex. 1985) (Baker App. at 112a n.33). Thus, if Hill can be the true "non-prevailing party" for §1988 attorneys fees purposes by Baker's and his counsel's own admission and by statements of the trial judge, then Hill should certainly be the true party defendant and appellant for purposes of this appeal.

Baker's authorities that Hill is not the true defendant are miscited. For example, *Brandon v. Holt,* 105 S.Ct. 873 (1985), properly read, indicates that a suit against a governmental official in his official capacity represents, in actuality, a suit against the jurisdiction of the government that the official represents. The analogy to *Brandon* in the instant case would most properly mean that Baker's suit against the district attorneys of Texas is, in effect, a suit against the specific counties that they represent in their jurisdictions, not against the State as a whole, since, as Baker has argued elsewhere in his Petition (Baker Petition at 11—12, 18—20), the district attorneys represent only their own counties, not the entire State. Consequently, Baker's cited cases do not apply to the instant issue regarding what parties are the true defendants in this case, except to reinforce Hill's position.

C. Baker's Reliance Upon The "True Motives" Of The Texas Attorney General Is Misplaced.

Throughout Baker's Petition, he places great reliance on the Attorney General's assessment of the interests served in dismissing the appeal. Baker argues extensively that the Attorney General's decision to dismiss the appeal was based on economic factors and the potential costs associated with recovery of Baker's attorneys fees against the State. Baker's asser-

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[4] Mr. Barber also admitted, in response to a direct question from Judge Jones at *en banc* oral argument, that he and his client had entered into a settlement with the Attorney General which would reduce their earlier fee award from the district court in return for the State dropping its then-pending appeal to the Fifth Circuit. Thus, Baker's allegation at page 14 of the Baker Petition that Texas has already been assessed more than $80,000 in costs and fees is no longer correct; the settled fee is less and cannot increase.

tions of "governmental reasons not to appeal an adverse decision" are mere conjecture and an attempt to direct the Court's attention away from the Attorney General's true motives in withdrawing the State's appeal. Nothing in the record indicates that the Attorney General was concerned with potential attorneys fees assessed against the State. In fact, the State has been taxed and has already paid Baker's counsel's legal fees.[5]

The Fifth Circuit clearly rejected Baker's arguments concerning "governmental reasons not to appeal" the judgment. The court was concerned with the adequacy of representation and not with the personal decisions of the Attorney General not to appeal. The court correctly determined that "where the district court has rejected binding Supreme Court authority, the circuit court is entitled to conclude as a matter of law that those interests are inadequately represented by those who fail to pursue the appeal. . . ."[6] On the basis of the record, the decision of the Texas Attorney General, Jim Mattox, not to appeal cannot be supported for any reason other than Mr. Mattox' personal bias and opinions favoring the repeal of laws prohibiting homosexual conduct.

Baker's reliance on the Attorney General's participation in the trial and unbiased decision regarding appeal is without merit. With the exception of filing a four-page "Response," the Attorney General did absolutely nothing at trial to defend the constitutionality of §21.06. The Attorney General did not participate in the filing of any pre-trial motions; did not conduct any discovery; did not offer any trial testimony; did not actively, if at all, participate in the trial; and, did not participate in trial strategy for the defendant-class. In fact, the Record indicates that although the City and District attorneys for Dallas offered evidence at trial and examined witnesses, the Attorney General was silent. (R. Vol. VII, 1-283 (Transcript of Proceedings)).

Baker's assertions of objective reasoning and analysis by the Attorney General are absurd. Texas Governor Mark White, who was Attorney General at the time of filing the Notice of

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5. Baker asserts in the Baker Petition that the State "will obviously be liable for . . . future awards under Section 1988." Baker Petition at 14. If, as Baker concludes, the State is going to be liable for future awards under §1988, then it would seem appropriate for the State to assist Hill in prevailing in the present action rather than assisting the State's purported adversary, Mr. Baker.

6. *Baker v. Wade*, 769 F.2d 289, 292 (5th Cir. 1985) (*en banc*).

Appeal by the State (November 1, 1982), determined that it was appropriate that an appeal be taken on behalf of the State. After the November 1982 election, Jim Mattox became Attorney General. Mr. Mattox' interest in §21.06 dates back to 1975 when he was a member of the Texas House of Representatives. On May 28, 1975, in the waning hours of the legislative session, Mr. Mattox attempted to repeal §21.06 by inserting it obscurely in a lengthy committee amendment to a similar Senate bill. The hidden reference was discovered, and by a vote of 117 YAYS and 14 NAYS, the reference to §21.06 was removed from the amendment. The Vote was a reaffirmation of §21.06 as the law of Texas. Mr. Mattox' personal attempt to repeal §21.06 failed.

On March 9, 1983, without reason or explanation, Mr. Mattox announced to the Fifth Circuit that the State would not prosecute this appeal (Hill App. 2). On March 19, 1983, Mr. Mattox filed a Motion to Withdraw the State's appeal (Hill App. 3). There is absolutely no support in the record for Baker's conclusion that Mr. Mattox' decision to withdraw the State's appeal was based upon anything other than Mr. Mattox' personal or political bias. Baker's unsupported presumption of "the interests of the State" being best served is clearly refuted by the meritorious grounds for appeal which the *en banc* Fifth Circuit determined constituted inadequate representation as a matter of law.[7]

Irrespective of the legal merits of A & M's appeal, the refusal of the Attorney General to allow A & M to retain outside counsel; the Attorney General's refusal to turn over the legal file to the University's outside counsel; and, the Attorney General's employment of an attorney directly opposing an institution of the State which he is charged to defend and

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[7] *Baker v. Wade,* 769 F.2d 289, 292 (5th Cir. 1985) (*en banc*). Jim Mattox' personal bias against laws regulating homosexual conduct is further evidenced by his actions with respect to the Attorney General's representation of Texas A & M University in *Gay Student Services. Gay Student Services v. Texas A & M University,* 737 F.2d 1317 (5th Cir. 1984). (The case involved the question of whether a homosexual organization had a right to be recognized on the Texas A & M University campus. The Fifth Circuit determined that Gay Student Services did have a constitutional right to recognition and that the University's failure to recognize the group was a violation of the United States Constitution.)

(Footnote continued on next page)

permitting such attorney to continue to represent clients opposed to those interests, shows Mr. Mattox's callous indifference to the interests and rights of the parties he is charged to represent with respect to the homosexual issue. Baker's heavy reliance upon the impartiality of the Texas Attorney General with respect to homosexual sodomy is misplaced. It is unclear whether Mr. Mattox' decision not to appeal is based upon a "governmental reason" or upon his personal or political bias in support of homosexual conduct. Nevertheless, a substantial question exists as to the true reasons why Mr. Mattox withdrew the State's appeal and is now fighting so vigorously to deny Hill and the defendant-class their right to appellate review of the judgment against them. This is not a matter which this Court should undertake to review by means of Baker's Petition.

D. Correct Role of State Attorneys General Under 28 U.S.C. §2403(b) And This Court's Decisions.

1. Section 2403(b) Intervention.

a. A State Officer Or Employee Was Already A Party.

b. The State May Intervene Only To Support The Constitutionality Of The Statute.

Baker argues (Baker Petition at 17) that Congress, through 28 U.S.C. §2403(b), "has long recognized the primacy of state attorneys general in directing litigation challenging the constitutionality of state law." Baker's reliance on §2403(b) in this

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(Footnote continued from previous page)

On October 3, 1984, the Fifth Circuit rendered its decision in *Gay Student Services.* After the Court's decision, the Attorney General repeatedly refused to appeal the decision despite the request of the A & M Board of Regents. Mr. Mattox also informed A & M that they could not seek outside counsel with respect to the appeal because he was the University's sole legal representative. Regardless of Mr. Mattox' statements, the University employed other counsel to represent A & M on appeal. Despite this action, Mr. Mattox continually refused to recognize A & M's new counsel, and refused repeated requests from A & M to forward the legal file to the new attorney of record for the University. Eighty-four days after entry of Judgment by the Fifth Circuit, the Attorney General realized his error and turned over the file.

J. Patrick Wiseman acted as lead counsel for Gay Student Services in its suit against Texas A & M. On October 1, 1984, Mr. Wiseman joined the Attorney General's office as Chief of the State and County Affairs Division. After joining the Attorney General's office, Mr. Wiseman continued to represent Gay Student Services with respect to the appeal to this Court. On or about December 26, 1984, J. Patrick Wiseman, as counsel for Gay Student Services, filed Appellee's Motion to Dismiss or Affirm in this Court.

case is sadly misplaced, because proper application of §2403(b) would preclude the Texas Attorney General from participating in this case at all.

The facial provisions of §2403(b) and the case law interpreting this statute declare that an attorney general may not intervene in a suit regarding a state statute's constitutionality if an officer or employee of the state is already a party and that, if allowed, a state may intervene only to *support* the constitutionality of the challenged statute. In the instant case, both at the trial level and at the appellate level, when the Attorney General attempted to intervene, State officers and employees were already party defendants to the cause. Moreover, the Attorney General has scrupulously avoided taking a position in this case on the constitutionality of §21.06; indeed, all of his efforts to have this appeal dismissed would act to defeat the statute, not support its constitutionality. The complete argument and authorities for these propositions have been supplied in Section II.D of the argument in Hill's Cross-Petition against Baker (No. 85-1512), and for the sake of brevity the Court is respectfully referred to those arguments and authorities.

2. If The Attorney General Refuses To Take A Stand On The Statute's Constitutionality, There Is No Article III Case Or Controversy And No Jurisdiction In This Court.

The Attorney General has repeatedly disavowed, both explicitly and implicitly, any intention to address or support the constitutionality of §21.06 in this case.[8] Moreover, the State's brief to the Fifth Circuit *en banc,* at 11, specifically admits that the State sought intervention on appeal only "to defend his [the Attorney General's] exclusive right to represent the State's interests before this Court." The brief itself studiously avoided addressing the constitutionality of §21.06, even though the Fifth

[8] For example, in response to the Attorney General's February 20, 1985 letter to the Fifth Circuit requesting intervention at the *en banc* stage (Hill App. 5), Hill's counsel telephoned the Attorney General, who admitted that he sought to intervene only to address the issue of Hill carrying forward the appeal and that he would not address the constitutionality of §21.06. *See* February 25, 1985 letter of Hill's counsel to Fifth Circuit (Hill App. 7).

Circuit's March 4, 1985 Order explicitly invited the Attorney General to brief that issue.[9]

In a similar case, this Court held that it had no jurisdiction and dismissed the suit for lack of any Article III case or controversy. *Princeton University and New Jersey v. Schmid,* 455 U.S. 100 (1982).[10] Precisely the same conclusion should be reached in this action. This cause should be dismissed and the Petitions denied, even though Baker himself may still be interested in the case, because the Texas Attorney General has failed and refused to assert a position on §21.06's constitutionality.

E. The Attorney General Is Not The Spokesman For The Defendants In This Case.

Once again, Baker attempts to mislead this Court in his argument that the Attorney General is the designated legal spokesman for Texas (Baker Petition at 18-19) since the truth *vel non* of this statement is irrelevant to the instant cause. The pertinent question herein is whether the Attorney General is the legal spokesman for Hill and defendant-class in this suit. Unequivocally, the Attorney General is *not* the spokesman for such defendants in this cause. In fact, Texas law itself clearly authorizes Hill to carry forward this appeal.

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9. The State's Petition to this Court (No. 85-1251) also fails to address the issue of the constitutionality of §21.06.

10. In *Princeton,* an individual was convicted of criminal trespass upon Princeton University's property in New Jersey, and the defendant appealed through the New Jersey courts. At the New Jersey Supreme Court level, Princeton University intervened as a party, and after that court reversed the lower court's judgment, both the State of New Jersey and Princeton University filed a joint notice of appeal and jurisdictional statement to this Court. The New Jersey Supreme Court had found the state criminal trespass statute unconstitutional, but in the State's brief to the United States Supreme Court, the New Jersey Attorney General deemed "it neither necessary nor appropriate to express an opinion on the merits" of the constitutionality of the statute. 455 U.S. at 101. In a *per curiam* opinion expressing the unanimous view of the eight participating Justices, this Court found that since the state "declined to take a position on the merits," there could be no case or controversy and: "We do not sit to decide hypothetical issues or to give advisory opinions." 455 U.S. at 102. The Court thus dismissed the appeal, even though the other party appellant, Princeton University, wanted to continue the appeal.

1. The Fifth Circuit Correctly Determined That Texas Law Authorizes Hill To Pursue The Appeal And That The Attorney General Has No Authority To Represent The Defendant Class And Its Memebers.

The agruments and authorities supporting this position have been briefed by Hill in his Brief in Opposition to the State's Petition. In the interests of brevity, the Court's attention is directed to Section III of Hill's Brief in Opposition to the State's Petition.

2. Under Texas Law, The Attorney General May Issue Formal Legal Opinions, But Such Opinions Do Not Bind Other State Agencies, Officers, Or Courts, Who May Assert Positions Contrary To The Attorney General.

State law demonstrates that the Attorney General is not all powerful and cannot bind other State agencies, officers, or courts with his opinions. Hill has provided a complete explanation with authorities for this proposition in his Brief in Opposition to the State's Petition at Section IV.C, and the Court is respectfully referred to that discussion in the interest of brevity herein.

F. Conclusion: Principles Of Comity And Federalism Support The Decision Of The Fifth Circuit.

The true principles underlying federal-state comity require that this Court allow the Texas Legislature, not the histrionics of a single state official (the Attorney General) nor the personal beliefs of a single federal trial judge, to determine the validity and continued vitality of §21.06. The Texas Legislature has consistently refused to repeal §21.06 at the behest of homosexual activists in Texas, *Baker v. Wade,* 553 F. Supp. 1121, 1151 (N.D. Tex. 1982), thus indicating that the will of the people of Texas is to maintain §21.06 as a viable state statute. Indeed, as Judge Reavley has cautioned: "Moral issues should be resolved by the people, and the laws pertaining thereto should be written or rescinded by the representatives of the people." 774 F.2d at 1286. This Court should not disturb the announced will of the people of Texas represented by the continued retention of §21.06.

III.

THE FIFTH CIRCUIT CORRECTLY DETERMINED THAT *DOE V. COMMONWEALTH'S ATTORNEY* WAS BINDING ON LOWER COURTS AND THAT THERE IS NO CONSTITUTIONAL RIGHT OF PRIVACY TO ENGAGE IN PRIVATE CONSENSUAL HOMOSEXUAL CONDUCT

A. *Doe* Is Binding.

Baker's extreme criticism of the Fifth Circuit's judicial restraint with respect to this Court's binding authority in *Doe v. Commonwealth's Attorney,* 425 U.S. 901 (1976), is unwarranted. Of the sixteen *en banc* judges that considered Baker's arguments, only one, Judge Goldberg, saw fit to write a dissenting opinion with respect to the court's holding that it was bound by *Doe.* Although seven judges dissented with respect to Hill's standing, none of the other six dissenters joined Judge Goldberg in his brief dissent on the merits.

Most courts have consistently followed the binding precedent in *Doe;* however, there are some exceptions, most notably, the majority in *Hardwick v. Bowers* and the district court in *Baker v. Wade.* These three judges erroneously felt that they were free to insert their own opinion as to the constitutional right of privacy rather than following this Court's precedent in *Doe.* The analysis of these jurists was expressly rejected by the nine members of the *Baker en banc* majority and, through implication, by six of the dissenters. In addition, the District of Columbia Circuit has firmly followed *Doe. Dronenburg v. Zech,* 741 F.2d 1388 (D.C. Cir. 1984). This Court should not grant Baker's Petition on this basis since *Hardwick v. Bowers* will dispose of the issue. The Fifth Circuit's treatment of *Doe* does not depart from established judicial standards. The court applied the correct legal analysis with respect to summary affirmances by this Court.

It is interesting that Baker relies upon Justice Rehnquist's concurring opinion in *Pressler v. Blumenthal,* 434 U.S. 1028 (1978), to demonstrate the Fifth Circuit's error in relying upon the binding precedent of *Doe.* Footnotes 5 and 17 of *Carey v. Population Services Int'l,* 431 U.S. 678, 688 n.5, and 694 n.17 (1977), formed the basis of Baker's argument that *Doe* was no

longer controlling. However, in *Carey* Justice Rehnquist noted in his dissent that the outer limits of the right of privacy had been reached with respect to homosexual conduct. As an example, Justice Rehnquist cited *Doe* and *Hicks v. Miranda,* 422 U.S. 332 (1975). *See Carey v. Population Services Int'l.,* 431 U.S. 678, 718 n.2 (1977) (J. Rehnquist, dissenting). Consequently, the Fifth Circuit's treatment of *Doe* does not depart from established legal standards. The Fifth Circuit correctly analyzed the procedural requirements of summary affirmances such as *Doe* and then applied the substantive judgment of *Doe* to the instant case.

B. No Right Of Privacy To Homosexual Conduct.

The *en banc* Fifth Circuit correctly determined that there is no constitutional right of privacy to engage in homosexual conduct. The Fifth Circuit followed this Court's summary affirmance in *Doe v. Commonwealth's Attorney* for the reasons stated by the District of Columbia Circuit in *Dronenburg v. Zech,* 741 F.2d 1388, 391-92 (D.C. Cir. 1984), and by Judge Kravitch in her dissent in *Hardwick v. Bowers,* 760 F.2d 1202, 1213-16 (11th Cir. 1985), *cert. granted sub nom. Bowers v. Hardwick,* 106 S. Ct. 342 (1985). Baker's Petition avoids the right of privacy argument because this Court will have an opportunity to determine that issue in *Bowers v. Hardwick,* No. 85-140.

With the exception of the district court below and two judges of the Eleventh Circuit in *Hardwick,* all other federal courts that have reviewed the right of privacy in the context of homosexual conduct have determined that homosexual conduct is not protected by the Constitution and that laws proscribing such conduct need not be reviewed with heightened scrutiny. In *Dronenburg,* Judge Bork analyzed *Griswold v. Connecticut,* 381 U.S. 479 (1965), *Eisenstadt v. Baird,* 405 U.S. 430 (1972), *Roe v. Wade,* 410 U.S. 113 (1973), and *Carey v. Population Services Int'l,* 431 U.S. at 694 (1977), and concluded that "we do not find any principal articulated *even approaching* in breadth that which the homosexual appellant seeks us to adopt." 741 F.2d at 1395-96 (emphasis added). Finally, Judge Bork concluded that "we can find no constitutional right to engage in homosexual conduct and . . . as judges, we have no

warrant to create one." 741 F.2d at 1397. This Court has consistently limited the right of privacy to such matters as activities relating to marriage, procreation, contraception, family relationships, and child rearing and education. This Court has never held that homosexual conduct is constitutionally protected. This Court's summary affirmance in *Doe* holds that it is not protected conduct. *Hardwick* will give this Court the opportunity to again reject the claims of homosexuals that their conduct is entitled to constitutional protection and that laws proscribing such conduct should be subject to heightened scrutiny. Therefore, Baker's Petition with respect to this issue should be denied.

IV.

THE FIFTH CIRCUIT CORRECTLY ANALYZED PETITIONER'S EQUAL PROTECTION CLAIM

Initially, this Court should note Baker's mischaracterization of the Fifth Circuit's opinions below regarding his equal protection claim. Contrary to Baker's assertion that the Fifth Circuit disposed of the equal protection argument "in a single, short paragraph" (Baker Petition at 23), Judge Reavley actually devoted considerable time to this argument in the Fifth Circuit's supplemental opinion on Baker's petition for rehearing *en banc*. Judge Reavley held that §21.06 was directed at certain *conduct,* not at a class of people, and that the statute affects only those who choose to act in the manner proscribed. 774 F.2d at 1287.

Baker also misstates the true nature of §21.06 in claiming that the law would ban consenting, adult sexual intimacy only in the confines of the home (Baker Petition at 24). In point of fact, the statute is facially silent regarding whether it applies in public as well as in private, and the Texas courts have held that the sodomy statute applies both in public and in private. *See Torme v. State,* 525 S.W.2d 9 (Tex. Crim. App. 1975); *Pruett v. State,* 463 S.W.2d 191 (Tex. Crim. App. 1970), *appeal dism'd,* 402 U.S. 902 (1970); *Bishoff v. State,* 531 S.W.2d 346 (Tex. Crim. App. 1976). The *en banc* Fifth Circuit also recognized this factor in its initial opinion in this case when it found: "Insofar as §21.0[6] condemns public homosexual conduct, it

overlaps Tex. Pen. Code Ann. §21.07 (Vernon 1974), which proscribes, among other sexual acts, deviate sexual intercourse in public places." 769 F.2d at 289 n.1.[11]

Moreover, Baker's own trial testimony and the trial judge's opinion both belie Baker's alleged concern about his right to privacy solely in his own home. Baker admitted at trial that he had never been arrested or even threatened with arrest for engaging in the prohibited conduct in the privacy of his own home. (R. Vol. VII at 155, 184). Moreover, as the trial court noted, Baker admitted that he traveled widely and could be subject to prosecution under §21.06 outside his hometown of Dallas. 553 F. Supp. at 1128 n.11. Thus, unless Baker carries his home on his back, he obviously contemplates indulging in the prohibited conduct outside of his own home and is estopped to claim before this Court that he is concerned about §21.06 solely with respect to his own home.

A. Baker's "Intimacies In The Home" Argument is Misplaced.

Baker's continual plea regarding "intimate behavior in the solitude of a private home" (Baker Petition at 24) is an attempt to divert this Court's attention away from the true nature of this case and the historical use of §21.06. As mentioned, Baker testified at trial that he had never been arrested or even threatened with arrest for engaging in homosexual sodomy in the privacy of his own home. Moreover, the uncontroverted trial testimony manifested that §21.06 has *never* been used in a

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11. Baker's counsel at trial recognized this potential public application cation of §21.06 through his in-depth questioning of Captain Milliken of the Dallas Police Department, Vice Division, regarding whether §21.06 and §21.07 could be applied to arrest homosexual offenders in a specific "gay bath" in Dallas that was raided by Vice Squad officers during the pendency of the case below. (R. Vol. VII at 272—74). For the Court's information, a "gay bath" is a euphemism for a large building catering exclusively to homosexuals where, at any given peak occupancy, numerous homosexual men may be inside engaging with each other in deviate, group sexual exploits. *See Harris v. United States,* 315 A.2d 569 (D.C. App. 1974) (*en banc*) (such a "homosexual health club" where regular group acts of sodomy took place held nothing more than a bawdy house and ruled a "nuisance per se"); *United States v. McKean,* 338 A.2d 439 (D.C. App. 1975) (same "health club's" cubicles used regularly for homosexual sodomitic acts); M. HUNT, GAY: WHAT YOU SHOULD KNOW ABOUT HOMOSEXUALITY 153 (1977) (gay bath patron commonly has "a dozen or more partners in a night").

private residence situation but has been invoked in numerous circumstances involving public or presumably public activity. (R. Vol. VII at 257-58, 265-66, 270-71, 272-74).

Baker further cites *Stanley v. Georgia,* 394 U.S. 557 (1969), to bolster his "privacy of the home" argument, but the Court must recognize that the instant suit is not a Fourth Amendment case involving any actual warrantless arrest of Baker in his home. In fact, the Fourth Amendment requirement of a search warrant or probable cause to invade a private residence provides sufficient protection for Baker's actual sex-in-the-home situation. With regard to all of the public and quasi-public circumstances in which the testimony revealed §21.06 to be enforced, *Stanley* has no application whatsoever. *See United States v. Reidel,* 402 U.S. 351, 354 (1971) (*Stanley* limited solely to the home situation).

Finally, Baker's hyperbolic "sanctity of the home" argument would sanction any type of conduct so long as it took place solely within the confines of a private residence and would lead to the conclusion that states may pass no laws against such activities as fornication, adultery, polygamy, incest, necrophilia, beastiality, and the like which may, but do not necessarily, occur in private. This Court's opinions and the decisions of numerous federal circuit courts reject this ultimate "privacy" argument in exactly these types of situations. *See Zablocki v. Redhail,* 334 U.S. 374, 399 (1978) (Powell, J., concurring — incest, bigamy, and homosexual conduct); *Potter v. Murray City,* 760 F.2d 1065 (10th Cir. 1985) (polygamy); *Shawgo v. Spradlin,* 701 F.2d 470 (5th Cir. 1983) (fornication); *Reynolds v. United States,* 98 U.S. 145 (1878) (polygamy). Surely this Court should not accept Baker's invitation to legitimize these types of sexual perversions through the oblation of the asserted "sanctity of the home" argument.

B. Baker's Gender-Classification Argument Is Invalid.

The Fifth Circuit, as well as the trial court below, correctly determined that homosexuals do not constitute a suspect or quasi-suspect class and, consequently, that laws proscribing homosexual conduct are not subject to strict scrutiny. The standard of review is whether such laws are rationally related to a legitimate state end. The claims of homosexuals that they constitute a suspect or quasi-suspect class have been rejected by

virtually every court that has reviewed them. Section 21.06 is neutral on its face and does not create classifications of people. The statute forbids conduct, not status. All persons, whether male or female; black, brown, or white; young or old; married or unmarried; employed or unemployed; rich or poor; or, of any religion or national origin, are forbidden from engaging in the carefully defined conduct. The statute applies to all and does not discriminate as to any group or sect of persons. Equal protection analysis is inapplicable in this situation.

Baker attempts to postulate a new quasi-suspect classification based upon "gender." Baker's gender postulate is nothing more than a new disguised suspect classification in which Baker hopes the Court will create a higher level of scrutiny with respect to instances of homosexual conduct or activity. Even the district court, in its erroneous conclusions and results throughout its memorandum opinion, did not go so far as to find that homosexuals constitute a suspect class such that a higher level of scrutiny is necessary. This Court should not venture into Baker's gender classification trap.

Baker offers the Court no authority for his gender-classification equal protection argument. The primary case cited by Baker, *Loving v. Virginia,* 388 U.S. 1 (1967), involved the *race* of the participants, not their *gender.* The leap from race to gender is too wide a gap to bridge in order to make §21.06 scrutiny an issue this Court should review. Gender classifications only apply, if at all, when one gender is given the opportunity or right to participate in conduct that is proscribed against the other gender. Section 21.06 applies equally to all genders. Baker's gender classification arguments are irrelevant and unsupported by any case law. Section 21.06 does not discriminate on the basis of a person's gender. It proscribes conduct, not gender. Baker's gender hypothesis is an irrelevant point which is unsubstantiated in law or reason.

C. The Fifth Circuit Properly Applied The Appropriate Level of Scrutiny.

Since, as demonstrated above, no suspect classification is at issue, equal protection analysis requires only a rational relationship to a legitimate state interest to sustain §21.06. *San Antonio School District v. Rodriquez,* 411 U.S. 1, 40 (1973). The

Fifth Circuit found morality to be such a legitimate state interest.

1. Morality Is A Legitimate State Interest, And Homosexual Sodomy Is Per Se Immoral And Indecent.

The federal and state authorities holding that morality and decency represent compelling state interests and that homosexual sodomy is per se immoral and indecent have been set forth fully in Hill's Cross-Petition against Baker (No. 85-1512), at Section IV.A, and the Court is respectfully referred to that Cross-Petition.

Baker's complaint (Baker Petition at 28) that the Fifth Circuit ignored the trial judge's findings concerning no evidence of a moral basis for 21.06 has been adequately answered by Judge Reavley in the Fifth Circuit's supplemental opinion on petition for rehearing *en banc* wherein he correctly notes that such a finding involves legislative as opposed to adjudicative facts. 774 F.2d at 1287. The distinction between legislative and adjudicative facts has been adequately explained in Section V of the argument in Hill's Cross-Petition against Baker, and Judge Reavley correctly held that the appellate court was not bound by any legislative fact finding of the trial judge.

Thus, the Fifth Circuit was free to find that homosexual sodomy is immoral and that §21.06 is rationally related to implementing the State's correct concept of morality in this regard.

2. The Fifth Circuit's Opinion Should Be Sustained On The Legitimate And Compelling Grounds Of Health And Safety.

The evidence concerning the dangers posed by homosexual conduct to the health and safety of the State's citizens is substantial. The material regarding the transmission of AIDS and other serious sexually transmitted diseases through the medium of the precise homosexual sodomitic acts proscribed by §21.06 has been summarized in Section IV.B of Hill's argument in his Cross-Petition against Baker (No. 85-1512). The Fifth Circuit's reliance on this evidence should be sustained.

Medical evidence indicating threats to the health of the public as a result of homosexual oral and anal sodomy grows daily. A recent controlled medical study of 30 monogamously

paired homosexual males, most of whom routinely practiced anal and oral sodomy, strongly supported the "hypothesis that allogeneic sperm is an etiologic factor in the pathogenesis of acquired immune dysregulation among homosexual males." The reason identified for this correlation, homosexual "anal-genital intercourse," was distinguished from the normal hetero-sexual genital-vaginal intercourse because of "the critical structural difference between the rectum and the vagina. While the lining of the vaginal mucosa comprises a squamous multilayer epithelium capable of protecting against any abrasive effect during intercourse, the interlining of the rectum is made of a single layer of columnar epithelium . . . incapable of protecting against any abrasive effect." Mavligit, et al., *Chronic Immune Stimulation By Sperm Alloantigens: Support For The Hypothesis That Spermatozoa Induce Immune Dysregulation In Homosexual Males,* 251 J. AM. MED. A. 237-41 (1984). Thus, the health dangers associated with homosexual oral and anal sodomitic acts — precisely those proscribed by §21.06. — occur as a direct result of such conduct.

Even more alarming, however, is another recent medical study of a homosexual "Patient O," who admitted having had 250 different male sexual partners each year from 1979 through 1981, a total of 750 different partners. This Patient O traveled throughout the United States during that three-year period, and investigating doctors identified Patient O as the carrier and common link among 40 separately infected AIDS patients from Los Angeles to New York City. The investigating physicians correctly concluded that this extreme example of disease-passing by one homosexual carrier reinforces the medical findings "regarding the importance of sexual activities in the development of AIDS among homosexual men." Auerbach, et al., *Cluster Of Cases Of The Acquired Immune Deficiency Syndrome: Patients Linked By Sexual Contact,* 76 AM. J. MED. 487-91 (1984).

Finally, on March 13, 1986, another medical study was reported in which public officials across the country are noting with concern a marked increased in tuberculosis infections among AIDS patients, frequently in the largest identified risk-group, homosexual and bisexual men. As the report summarizes, the cause for concern is great: "The TB bacillus, however,

is a highly infectious microbe that can infect even the healthiest person and it can be easily spread by coughs and sneezes."[12]

In the face of such compelling medical evidence regarding the dangers to the homosexual participants and the public, it simply cannot be claimed that §21.06 is not rationally related to the legitimate and compelling state interests of public health and safety. Consequently, Baker's arguments to the contrary fail, as the Fifth Circuit correctly concluded.

CONCLUSION

The case at bar, with its unusual named defendant class of all state district, county, and city attorneys, with the State Attorney General dropping an appeal and later attempting to reintervene in the same appeal, and with the original named class representatives failing to timely appeal but a class member filing his own timely notice of appeal, is so procedurally unique that, in all probability, such a case will never recur. As discussed above, Baker's counsel admitted at *en banc* oral argument that he would never structure a case in this fashion again, and new homosexual challenges to state sodomy statutes (such as that of Louisiana) have declined to adopt this defendant-class tactic. Therefore, since this case is not likely to recur and involves solely the unique claims of the instant parties, this cause does not provide an appropriate vehicle for the Supreme Court to exercise its discretionary certiorari jurisdiction and thus exhaust the valuable time of this Court.

Moreover, as described above, there is no real conflict between *Hardwick* and the case at bar since *Hardwick* was not a decision on the merits regarding the constitutionality of the

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12. *Tuberculosis Rise Among AIDS Patients Raises Concern About Wider TB Infection,* Wall Street Journal, March 13, 1986, at 25. Other medical reports frequently identify the additional risk of acquiring AIDS through blood transfusions. *E.g.,* Peterman, et al., *Transfusion-Associated Acquired Immunodeficiency Syndrome In The United States,* 254 J. AM. MED. A. 2913 (1985). And, of course, the evidence identifying homosexual anal and oral sodomy as prime vectors in the transmission of AIDS continues to mount. *E.g.,* Jaffe, et al., *The Acquired Immunodeficiency Syndrome In Gay Men,* 103 ANNALS INTERN. MED. 662 (1985); Levine, et al., *Retrovirus And Malignant Lymphoma In Homosexual Men,* 254 J. AM. MED. A. 1921 (1985); McKusick, et al., *The AIDS Epidemic: A Model For Developing Intervention Strategies For Reducing High-Risk Behavior In Gay Men,* 12 SEX. TRANSM. DIS. 229 (1985).

Georgia statute, but only a Rule 12(b) pretrial dismissal, and this Court, having accepted *Hardwick,* can now correct the Eleventh Circuit's mistake regarding the authority of *Doe.*

Finally, a decision by the Court in the instant cause might be premature, since it could be instructive for the Court to wait to determine how other federal circuit courts decide the substantive issues involved in this case, as a number of sodomy statute challenges are presently working their way through the lower federal court system. In fact, it might be helpful to await a true conflict between the circuits on some of these cases in order to frame more clearly the issues and obtain a true adversarial case or controversy between the states' attorneys general in these other cases and the homosexual plaintiffs. A similar rationale was employed by this Court to dismiss certiorari in *New York v. Uplinger,* and the Court should consider this aspect carefully in acting upon the instant Petition.

For all of the above reasons, Baker's Petition for a Writ of Certiorari should be denied. Alternatively, this Court should grant Baker's Writ and summarily affirm the Fifth Circuit's holding in Hill's favor.

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CERTIFICATE OF SERVICE

I hereby certify that three true and correct copies of the above and foregoing have been mailed, by Certified Mail, Return Receipt Requested, to all attorneys of record on this 26th day of March, 1986.

/s/ WM. CHARLES BUNDREN

Wm. Charles Bundren

No. 85-1225

Supreme Court, U.S.
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IN THE
Supreme Court of the United States

OCTOBER TERM, 1985

DONALD F. BAKER,

Petitioner,

v.

HENRY WADE, DISTRICT ATTORNEY OF DALLAS COUNTY, TEXAS, IN HIS OFFICIAL CAPACITY; AND LEE HOLT, CITY ATTORNEY OF DALLAS, TEXAS, IN HIS OFFICIAL CAPACITY; AND THE CLASS OF ALL CITY, COUNTY AND DISTRICT ATTORNEYS IN THE STATE OF TEXAS, IN THEIR OFFICIAL CAPACITIES,

AND

DANNY E. HILL, 47TH DISTRICT ATTORNEY,

Respondents.

ON PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

PETITIONER'S REPLY BRIEF

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In *Bender* v. *Williamsport Area School District*, No. 84-773 (March 25, 1986), this Court held that a federal court of appeals

was without jurisdiction to hear an appeal in a § 1983 suit brought against school board members in their official capacities, where the school board had declined to press the appeal after losing in the district court and the jurisdiction of the appellate court had been invoked only by a single, dissenting member of the school board.

A group of students had sued the Williamsport Area School District and the nine members of its school board in their "official capacities," seeking declaratory and injunctive relief for alleged violations of the students' constitutional rights. Slip Op. 2. The district court entered judgment for the plaintiffs and the School District declined to appeal. *Id.* at 4. John Youngman, a member of the school board and "the lone dissenter in a decision by the other eight members . . . to forego an appeal," *id.* at 9, filed a notice of appeal. *Id.* at 4, 5.

Without dissent,[1] this Court held that, "[a]s a member of the School Board sued in his official capacity, Mr. Youngman has no personal stake in the outcome of the litigation and therefore did not have standing to file the notice of appeal." Slip Op. 9. An "'official-capacity suit is . . . to be treated as a suit against the entity,'" *id.* (quoting *Kentucky* v. *Graham*, 105 S.Ct. 3099, 3105 (1985)), and since the entity in question, the school board, had chosen not to appeal an adverse decision, "Mr. Youngman's status as a School Board member [did] not permit him to 'step into the shoes of the Board' and invoke *its* right to appeal." Slip Op. 9 (emphasis added).

That logic is equally dispositive of this case. In *Williamsport*, Youngman "participated in th[e underlying] lawsuit only as a member of the [defendant] school board, sued in his official

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[1] The dissenting opinions argued only that a decision on the merits of the appeal was in order on the separate ground, irrelevant here, that Mr. Youngman had standing to appeal because of his status as a parent of children enrolled in the school district. *See* Slip Op. 1-2 (Burger, C.J., dissenting); *id.* at 1 (Powell, J., dissenting).

capacity. The *real party in interest* in that lawsuit was the board." Slip Op. 1 (Marshall, J., concurring) (emphasis added). In the case at hand, Danny Hill did not even participate in the underlying lawsuit: he was merely one member of the defendant class of all city, county and district attorneys in Texas, all of whom were sued solely in their official capacities. Despite notice from the class representative even before the defendant class was certified (23a n.1, 88a n.3), Hill declined to take any part in the proceedings until after the conclusion of trial and the entry of judgment. (88a & n.3). Hill's attempt to intervene more than six months after the entry of judgment was denied by the district court and Hill was adjudicated to be unfit to represent the interests of the State of Texas and the defendant class. (111a).[2] And the "real party in interest" in this case is undeniably the State of Texas, since it is an enactment of that sovereign entity — and not of Hill's bailiwick, Potter County, nor of Danny Hill himself — that has been challenged as unconstitutional. Once the State of Texas declined to appeal from the district court's holding of unconstitutionality,[3] the case was over: "[t]here was nothing left to litigate." Slip Op. 1 (Marshall, J., concurring).

Indeed, Danny Hill's lack of standing to appeal is even clearer in this case than was board member John Youngman's in *Williamsport*. Youngman, although the "lone dissenter" from the board's decision not to appeal, Slip Op. 9, was at least

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[2] The latter ruling has never been overturned. *See* Baker's Petition at 6-7 & nn.13, 14, 15. As this Court noted in *Williamsport*, it "is particularly important to observe the [procedural] requirements [for intervention] in cases in which the interest of the litigant seeking to appeal diverges from the interest of the party to the suit." Slip Op. 13 n.9. Of particular relevance in this regard are the district court's conclusive findings (1) that Danny Hill was not an adequate representative of the interests of the State of Texas, and (2) that Hill had failed to show that he was not simply a passive front for a private group with its own ax to grind. (87a & n.2, 90a & n.8, 111a, 112a).

[3] The representatives of the defendant class, the City and District Attorneys of Dallas, also decided not to appeal. (89a).

a co-equal member of a collegial body who might under some circumstances be able to complain that his vote had been diluted or rendered nugatory under state law. *Id.* at 10 n.7.[4] But in that event his relief would lie not in arrogating to himself the public entity's right to appeal, but in "a mandamus or like remedy against the Secretary of the School Board." *Id.* In stark contrast, the legal hierarchy of the State of Texas is not "collegial," and Danny Hill is by no means the equal of the Texas Attorney General, who has exercised his prerogative to decide that appealing the district court judgment in this case is not in the best interests of the state. In objecting to that decision, Hill is the "lone dissenter" among 1,085 city, county and district attorneys, and if the law provides him any "remedy" against the Attorney General's decision, it must also lie in a state court action for mandamus. Hill attempted to compel the Attorney General to prosecute an appeal in this case by just that means, and was rebuffed by the Supreme Court of Texas. (89a n.7).[5]

The fact that Hill is charged with directly enforcing the law cannot distinguish him from the school board member who sought to appeal in *Bender* v. *Williamsport*.[6] The only way that Hill can avoid dismissal of his appeal under *Williamsport* is by proving that he and the other local prosecutors whom he purports to represent — none of whom has seen fit to join Hill's crusade — have cognizable interests of their own, distinct from that of the State of Texas, in appealing a judgment

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[4] Of course, "[g]enerally speaking, members of collegial bodies do not have standing to perfect an appeal the body itself has declined to take." Slip Op. 9-10.

[5] *See* Baker's Petition at 6 n.10.

[6] The outcome in *Williamsport* would have been the same if the students had been barred by some Eleventh Amendment-like principle from suing the school board itself for denying them the use of school rooms for their religious activities, and had instead sued the teachers and janitors whose duty it was to patrol the halls and classrooms to stop impermissible prayer meetings. Surely such employees could not override a school board decision to accept rather than appeal the district court's ruling that the meetings must be permitted.

that simply enjoins them from enforcing the *state* statute invalidated by the district court.[7] This he cannot do.

First, Hill was sued only in his official capacity as a local prosecutor charged with enforcing *state* laws; in that role, he cannot have any interest in this case distinct from that of the State of Texas in seeing the state's criminal laws enforced.[8] After all, in his individual capacity, Hill has absolutely no "judicially cognizable interest in the prosecution or non-prosecution of another." *Linda R.S.* v. *Richard D.*, 410 U.S. 614, 619 (1973). Second, although Hill has devoted much space to repeating that he purports to represent the interests of the defendant class of local prosecutors, *not* the interests of the State of Texas,[9] his profuse filings provide not one word explaining *how*, as District Attorney of Potter County, he has any cognizable interest in enforcing § 21.06 that is distinct from the interest of Texas and its Attorney General in seeing the state's criminal laws enforced. Indeed, Hill expressly concedes that, with respect to § 21.06, his *only* duty is that of "'enforcing the statute *in the interests of the state and not simply in the interest of the locality where he serves.*'"[10] And Hill further concedes that, on the question of his standing to appeal, "[t]he *en banc* opinion itself expressly holds that Hill is 'a proper official under Texas law to *represent the state.*'"[11]

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[7] Hill has never alleged such an interest. And, of course, in order to provide an alternative ground for standing to appeal, such a separately cognizable interest "must affirmatively appear in the record." *Williamsport*, Slip Op. 11.

[8] Hill has not alleged — nor could he — that either obeying the injunction of the district court or living with the Attorney General's decision not to appeal compels him to violate his oath as a district attorney. *Cf. Allen* v. *Bd. of Education*, 392 U.S. 236, 241 n.5 (1968); *see Williamsport, supra*, Slip Op. 10 n.7. Indeed, there is a radical inconsistency between Hill's supposed interest in dissolving the injunction against enforcing the Texas sodomy law against Baker, and Hill's claim that Baker is at no risk of prosecution under that law. *See* Part III., *infra*.

[9] *See, e.g.*, Cross-Petition in No. 85-1512 at 9.

[10] Cross-Petition in No. 85-1512 at 18 (citations omitted) (emphasis added).

[11] *Id.* at 17 n.20 (citations omitted) (emphasis added).

Third, Hill has not mentioned any local governmental interest distinct from those that were considered and rejected by the Attorney General in deciding not to pursue an appeal.[12] Nor has Hill alleged the existence of any circumstance unique to Potter County that requires the enforcement there of a law which the State of Texas has decided it can do without.[13]

Therefore, on the strength of *Bender* v. *Williamsport*, this Court should summarily vacate the *en banc* decision of the Fifth Circuit and remand with instructions to dismiss Danny Hill's appeal for lack of jurisdiction.

II. THE INTERESTS OF FEDERALISM LIKEWISE MANDATE THAT HILL'S APPEAL TO THE FIFTH CIRCUIT BE DISMISSED.

The facts of this case present an even more compelling rationale for vacating the judgment below than did the situation this Court evaluated in *Bender* v. *Williamsport*. By entertaining the appeal of a dissident board member in *Williamsport*, the Third Circuit committed an error to which no one — including the school board — objected, until this Court itself noticed the problem after granting certiorari. Slip Op. 5. But here the

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[12] Most of Hill's general "health and safety" evidence, *see, e.g.*, Brief in Opposition at 22-24, was considered and rejected by the district court. *See* Appendix D. Hill's statement that "the Fifth Circuit's reliance on this evidence should be sustained," Brief in Opposition at 22, completely misrepresents the decision below. Even a quick glance at the Fifth Circuit's five-page opinion, Appendix A, and its three-page order denying rehearing, Appendix F, reveals that the court below never even *considered* health or safety as a justification for § 21.06. Indeed, in his Cross-Petition in No. 85-1512 at 27-28, Hill felt it necessary to present some sort of belated motion to this Court that this material somehow be retroactively deemed part of the record.

[13] Indeed, the district court expressly noted that there was no evidence of any such special circumstance. (89a n.5). This is not a case where local government has challenged, under the federal Constitution, a state decision to override a local policy choice. *Cf. Washington* v. *Seattle School District No. 1*, 458 U.S. 457 (1982).

Fifth Circuit[14] took jurisdiction of Hill's appeal over the vigorous objections both of Petitioner Baker and of the State of Texas. Because the relevant public entity in this case is not merely a local school board but a *sovereign state*, and because the objections to a disgruntled official's renegade appeal that the court below ignored were voiced not by a school superintendent but *by the state itself*, this case implicates fundamental issues of federalism that were absent in *Williamsport*.

By its unprecedented judicial sponsorship of Danny Hill, the Fifth Circuit has inverted a legal hierarchy assembled by the people of Texas in their constitution and by the legislature of Texas in its statutes. Neither Hill nor the court below offers a clue as to where that court derived its authority to empower a single local prosecutor to dictate litigation strategy and legal policy to the entire state, and to expose the Texas treasury to further liability for attorneys' fees — all in direct contravention of the express objections of the state's designated chief legal officer. The all too real threat that this frightening innovation poses to state legal structures throughout the nation is underscored by the filing in this case of a brief *amicus curiae* joined by half the States in the Union. For Danny Hill nonetheless to insist that "federal-state relations are not at issue,"[15] and that this case involves "merely a matter of Texas state law regarding which state officers may represent themselves in a federal forum,"[16] is to display gross insensitivity to the legitimate concerns and sovereign prerogatives of the several states.

In this respect, pages 9-12 of the Brief in Opposition — wherein Hill launches an intemperate assault on the character and motives of Attorney General Jim Mattox — are quite re-

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[14] This was the decision of the Fifth Circuit sitting *en banc*. *See* Appendix A. The prior panel of the Fifth Circuit threw out Hill's appeal, holding that the Attorney General's decision not to appeal concluded the matter. *See* Appendix E at 128a-132a.

[15] Hill's Brief in Opposition in No. 85-1251 at 7.

[16] Hill's Brief in Opposition in No. 85-1225 at 6.

vealing, although otherwise they offer nothing that warrants this Court's attention.[17] Hill's emphasis on this material suggests that his real "interest" is in venting his violent displeasure with what he perceives to be the Attorney General's political views, and that his real ground for pressing this appeal may be nothing more than "an attempt to turn that displeasure into a cause célèbre." *Connick* v. *Myers*, 461 U.S. 138, 148 (1983). One need not contest Hill's right to criticize the decisions of Texas' public officials to recognize that his unseemly crusade against the Attorney General of Texas is hardly an adequate basis for the Fifth Circuit's decision to assert jurisdiction over a case which properly terminated when the real party in interest, the State of Texas, declined to appeal.

III. A DECISION TO VACATE THE FIFTH CIRCUIT'S JUDGMENT WOULD OBVIATE ANY NEED TO REVIEW THE DISTRICT COURT'S RULINGS ON STANDING OR THE MERITS.

Application of the principles enunciated in *Williamsport* would dispose of this case in its entirety and relieve the Court of any need to review the district court's judgment[18] — much less to consider still further submissions of the sort with which Hill has persisted in burdening this Court. It nonetheless seems appropriate to stress that Hill's own claimed interest in lifting

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[17] Of course, the Court may wish to consider whether the inclusion of the material on these pages merits sanctions, and whether it should be stricken as "burdensome, irrelevant, immaterial, and scandalous matter," pursuant to Supreme Court Rules 22.1 and 34.6.

[18] Vacating the judgment below and requiring dismissal of Hill's appeal would, of course, reinstate the judgment of the district court without any opportunity for this Court to review either the district court's jurisdiction over the matter or its ruling on the merits. But that fact need not detain this Court any more here than it did in *Williamsport*, where the identical course of action reinstated a trial court judgment that this Court never reviewed.

the district court's injunction barring enforcement of § 21.06 against Petitioner Baker only reenforces the findings of both courts below that Baker has a clear and concrete stake in the outcome of this case.

Hill attempts to cloud Baker's standing to challenge § 21.06 by invoking a wholly inapposite line of cases. In relying on *Steffel* v. *Thompson*, 415 U.S. 452 (1974), and *Los Angeles* v. *Lyons*, 461 U.S. 95 (1983), Hill conveniently overlooks the fact that those cases involved statutes or government policies that applied with an even hand to *all* members of the public.[19] In contrast, as Hill himself notes,[20] § 21.06 *targets* the particular sexual conduct in which Don Baker and other homosexuals seek to engage.[21] Indeed, it is undisputed that Baker has engaged in the past, and wishes to engage in the future, in precisely the acts proscribed by § 21.06.

This case is therefore governed by the standing analysis of such cases as *Doe* v. *Bolton*, 410 U.S. 179, 188-89 (1973), and

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[19] "*Steffel* concerned a general trespass ordinance that did not, on its face, apply particularly to activities in which Steffel engaged or sought to engage." *Ellis* v. *Dyson*, 421 U.S. 426, 447 (1975) (Powell, J., dissenting). *Lyons* concerned a police choke-hold policy that was potentially implicated in *every* encounter between police and the public, not just in confrontations with the police in which Lyons alleged that he engaged, or was likely to engage in the future.

[20] Far from denying that § 21.06 singles out the intimate practices of homosexuals, Hill believes this to be the law's greatest virtue. *See, e.g.*, Cross-Petition in 85-1512 at 24-26.

[21] Of course, nothing in this standing analysis depends upon viewing the target group as a "suspect class" in assessing the case on its merits. In this regard, Petitioner notes that in the Brief in Opposition at 20-21, Hill does battle with a "suspect class" argument that Petitioner has never advanced. Meanwhile, Hill neglects to oppose in any way Petitioner's equal protection argument that § 21.06 is unconstitutional because it criminalizes, solely on the basis of the gender of the accused, conduct otherwise legal in Texas. *See* Baker's Petition at 26-27. Moreover, Hill apparently concedes in its entirety Petitioner's contention that the decision below must be reversed because the Fifth Circuit failed to apply even the minimum rationality test, let alone a more rigorous standard of scrutiny, in reviewing § 21.06 under the Liberty Clause of the Fourteenth Amendment. *See* Baker's Petition at 24-25, 27-29.

Lake Carriers' Ass'n v. *MacMullan*, 406 U.S. 498, 506-08 (1972), where this Court "found constitutional challenges to state and federal statutes justiciable despite the absence of actual threats of enforcement directed *personally* to the plaintiff." *Ellis* v. *Dyson*, 421 U.S. 426, 447 (1975) (Powell, J., dissenting) (emphasis added). For example, physicians who wished to perform abortions were found to have standing to challenge a Georgia abortion law in *Doe* v. *Bolton* on the ground that the "physician is the one against whom these criminal statutes directly operate," 410 U.S. at 188, even though "the record does not disclose that any one of them has been prosecuted, or threatened with prosecution," *id.* Baker's standing is even clearer than that of the *Doe* physicians, for the district court here found that the threat of prosecution to Baker was "credible and real" (69a)[22] — a finding upheld by the Fifth Circuit *en banc*. (2a).

CONCLUSION

For the foregoing reasons, the Court should summarily vacate the judgment below and remand the case with instructions to dismiss the appeal for want of jurisdiction.

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[22] In contrast, the plaintiff in *Doe* v. *Commonwealth's Attorney*, 403 F.Supp. 1199 (E.D. Va. 1975), *aff'd mem.*, 425 U.S. U.S. 901 (1976), alleged only that his awareness of the Virginia sodomy law had a "chilling effect" on his social life, *see* Jurisdictional Statement in *Doe*, No. 75-896 at 4.